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1937

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	172	I C	584
490	39	B L R	890
	ILR	1937 B	807
	172	I C	420
491	39	B L R	881
	172	I C	430
493	39	B L R	903
	ILR	1937 B	821
494	39	B L R	920
	172	I C	464
496	39	B L R	1151
	172	I C	401

Other Journals = All India Reporter

I L R (1937) Bombay = All India Reporter

ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R		
1	1936	B	389	211	1937	B	55	365	1937	B	148	642	1937	B	337	782	1937	B	417
18	,,	,,	330	215	1936	,,	408	369	,,	,,	260	655	,,	,,	275	795	,,	,,	461
59	,,	,,	386	225	1937	,,	104	375	,,	PC	152	666	,,	,,	357	801	,,	,,	456
68	,,	,,	372	236	,,	,,	121	388	,,	,,	189	670	,,	,,	385	807	,,	,,	490
78	,,	,,	453	244	,,	,,	186	402	,,	B	326	674	,,	,,	454	811	,,	,,	387
85	,,	,,	418	256	,,	,,	160	421	,,	,,	64	679	1936	,,	459	821	,,	,,	493
99	1937	,,	48	263	,,	,,	153	425	,,	,,	63	691	1937	,,	365	827	,,	,,	479
106	,,	,,	11	268	,,	,,	155	432	,,	,,	98	705	,,	,,	181	830	1938	,,	41
113	,,	,,	135	293	,,	,,	198	443	,,	,,	162	708	,,	,,	446	837	1937	,,	457
127	,,	,,	56	304	,,	,,	150	464	,,	,,	307	711	,,	PC	119	839	,,	,,	464
136	,,	,,	25	310	,,	,,	214	508	,,	,,	279	719	,,	B	399	843	,,	,,	374
140	,,	,,	142	320	,,	,,	196	591	,,	PC	189	724	,,	,,	472	867	1938	,,	137
144	,,	,,	111	326	,,	,,	238	602	,,	B	401	743	,,	,,	371	890	,,	,,	18
150	,,	,,	101	338	,,	,,	211	623	,,	,,	167	751	,,	,,	364	895	,,	,,	121
158	,,	,,	114					628	,,	,,	225	756	,,	PC	271	906	1937	,,	458
175	,,	,,	52	348	,,	,,	158	682	,,	,,	432	763	,,	B	39	918	1938	,,	50
183	,,	,,	1	359	,,	,,	191	636	,,	,,	334	774	,,	,,	395	931	1937	,,	480

39 Bombay Law Reporter = All India Reporter

BLR	A I R			BLR	A I R			BLR	A I R			BLR	A I R			BLR	A I R		
1	1936	PC	289	130	1937	B	238	288	1937	B	307	471	1937	B	305	626	1937	B	454
18	,,	,,	269	138	,,	,,	167	316	,,	PC	35	476	,,	,,	410	629	,,	,,	364
32	1937	B	162	142	,,	,,	177	317	,,	,,	1	486	,,	,,	392	633	,,	,,	374
44	,,	,,	155	147	,,	,,	208	322	,,	,,	4	490	,,	,,	397	648	,,	,,	387
61	,,	,,	186	152	,,	,,	196	329	,,	B	432	493	,,	,,	382	654	,,	,,	472
70	,,	,,	160	156	,,	,,	181	332	,,	,,	326	495	,,	,,	447	666	,,	,,	477
74	,,	,,	148	159	,,	,,	211	343	,,	,,	262	497	,,	,,	384	675	,,	,,	423
76	,,	,,	152	165	,,	,,	341	351	,,	,,	334	536	,,	,,	395	688	,,	PC	27
77	,,	,,	165	189	,,	,,	266	355	,,	,,	260	540	,,	,,	365	699	,,	,,	31
82	,,	,,	153	203	,,	,,	198	359	,,	PC	24	548	,,	,,	275	706	,,	,,	21
85	,,	,,	191	211	,,	,,	169	363	,,	,,	42	572	,,	,,	483	713	,,	,,	46
89	,,	,,	150	216	,,	,,	193	369	,,	,,	39	591	,,	,,	337	720	,,	,,	50
94	,,	,,	202	224	,,	,,	244	374	,,	,,	36	599	1938	,,	20	726	,,	,,	101
103	,,	,,	158	249	,,	,,	231	382	,,	B	279	606	1937	,,	389	731	,,	,,	69
110	,,	,,	180	260	,,	,,	225	444	,,	,,	401	610	,,	,,	357	744	,,	,,	107
112	,,	,,	173	263	,,	,,	242	458	,,	,,	358	613	,,	,,	385	748	,,	,,	61
118	,,	,,	182	266	,,	,,	226	468	,,	,,	388	616	,,	,,	399				
128	,,	,,	214	277	,,	,,	217	470	,,	,,	336	620	,,	,,	371	765	,,	,,	133

39 Bombay Law Reporter = All India Reporter (*Concld.*)

BLR	AIR			BLR	AIR			BLR	AIR			BLR	AIR			BLR	AIR		
775	1937	PC	139	910	1938	B	41	1010	1937	PC	239	1105	1938	B	18	1184	1938	B	87
782	"	"	143	915	1937	"	457	1012	"	"	240	1108	"	"	84	1187	"	"	33
787	"	"	163	917	"	"	476	1014	"	"	242	1115	"	"	1	1209	"	"	83
795	"	B	483	920	"	"	494	1019	"	"	260	1124	"	"	54	1212	"	"	90
807	"	"	449	925	"	"	464	1021	"	"	276	1138	"	"	81	1214	"	"	108
815	"	"	461	928	"	"	453	1025	"	"	189	1141	"	"	86	1217	"	"	125
820	1938	"	10	933	"	PC	185	1034	"	"	251	1143	"	"	68	1230	"	"	110
832	1937	"	480	939	"	"	228	1041	"	"	256	1146	"	"	65	1233	"	"	97
835	"	"	417	946	"	"	152	1046	"	"	271	1151	1937	"	496	1257	"	"	148
846	"	"	446	955	"	"	124	1050	"	"	261	1152	1938	"	93	1269	"	"	137
851	"	"	465	960	"	"	179	1056	1938	B	50	1156	"	"	6	1282	"	"	132
867	1938	"	23	963	"	"	146	1062	"	"	43	1163	"	"	91	1287	"	"	121
881	1937	"	491	966	"	"	119	1065	1937	"	481	1166	"	"	77	1295	"	"	146
885	"	"	456	970	"	"	127	1069	1938	"	63	1172	"	"	96	1299	"	"	134
890	"	"	490	979	"	"	233	1072	"	"	87	1175	"	"	75	1304	"	"	113
895	"	"	458	990	"	"	174	1083	"	"	44	1179	"	"	85	1309	"	"	115
903	"	"	493	997	"	"	223	1094	"	"	71	1182	"	"	89	1324	"	"	111
907	"	"	479	1005	"	"	201	1102	"	"	69								

LIST OF CASES OVERRULED and REVERSED
IN
A. I. R. 1937 Bombay.

Abdul Satarkhan, *In re*, (1935) 59 Bom 551=37 Bom L R 580=36 Cr L J 1372=A I R 1935 Bom 359=158 I C 168	Overruled in A I R 1937 Bom 1 (F B).
Bajirao v. Sakharam, (1931) 33 Bom L R 463=A I R 1931 Bom 295=132 I C 434	„ A I R 1937 Bom 19.
Commissioner of Income-tax, Bombay v. Gomedalli Lakshminarayan, (1935) 59 Bom 618=37 Bom L R 692=A I R 1935 Bom 412=159 I C 424	Reversed in A I R 1937 P C 239.
Emperor v. Ranchhod Harjivan, (1925) 27 Bom L R 1019=26 Cr L J 1461=A I R 1925 Bom 479=89 I C 1029	Overruled in A I R 1937 Bom 481 (F B).
New Piece Goods Bazaar Co. v. Jivabhai, (1913) 15 Bom L R 681=20 I C 537	„ A I R 1937 Bom 162 (F B).
Umabai Bhagwant v. Nani Mahadev, (1936) 60 Bom 102=38 Bom L R 100=A I R 1936 Bom 135=162 I C 133	„ A I R 1937 Bom 279 (F B).
Vishnu Bapu v. Lakshmi Sakharam, (1935) 37 Bom L R 193=A I R 1935 Bom 182=158 I C 1085	„ A I R 1937 Bom 279 (FB).
Yamaji v. Antaji, (1899) 23 Bom 442	„ A I R 1937 Bom 162 (F B).

THE

ALL INDIA REPORTER

1937

Bombay High Court

✻✻ A. I. R. 1937 Bombay 1

FULL BENCH

Beaumont, C. J., Rangnekar and
N. J. Wadia, JJ.

Emperor

v.

Chhotalal Amarchand—Accused.

Criminal Appeal No. 491 of 1935, Decided on 1st September 1936, from order of Presidency Magistrate, Third Court, Bombay.

(a) Criminal Trial—Trade mark—Infringement of—Test—General 'get-up' should be considered (Per *Broomfield, J.*).

Per *Broomfield, J.*—The test of an offence of infringement of trade mark is whether there is such a similarity in the trade mark, label and general get-up as might mislead an ordinary purchaser who would not be likely to notice the differences or attach importance to them. The general get up is one of the matters which should be taken into consideration in deciding whether the imitation of the trade mark or label is calculated to deceive: *John Harper & Co., Ltd.* v. *Wright and Butler, etc., Ltd.*, (*1896*) *1 Ch 142*; *Singer Manufacturing Co.* v. *Loog*, (*1882*) *8 A C 15*, *Rel. on*; *A I R 1914 Bom 128*, *Ref.* [P 3 C 2]

(b) Trade Mark—Continuing nature of offence — Doubt regarding continuing nature expressed.

It is very doubtful if there could be a continuing offence with regard to an infringement of trade mark in the sense in which there could be a continuing tort, or a continuing breach of contract, having regard to the provisions of the Criminal Procedure Code as to the framing of charges and as to the charges which can be tried at one and the same trial. It is quite clear that a Court could not charge a man with committing an offence of an infringement of trade mark *de die in diem* over a substantial period. [P 6 C 2; P 7 C 1]

✻✻ **(c) Merchandise Marks Act (1889), S. 15 — Limitation — Starting point is date of offence charged**: *59 Bom 551=A I R 1935 Bom 359=158 I C 168, Overruled.*

The words 'commission of the offence' in S. 15 mean commission of the offence in respect of which a prosecution is launched, that is to say, commission of the offence charged. Hence if the date of the offence is more than three years before the commencement of the prosecution, then the prosecution is barred under S. 15 whether or not the complainant had knowledge of the offence. If the offence charged is less than three years, but more than one year, before the date of the prosecution, then the prosecution is barred if the complainant had knowledge of the commission of the offence charged for more than a year before the date of the prosecution. But where the offence is less than one year from the date of the prosecution, then there is no bar under S. 15. So in all cases the starting point of limitation under S. 15 is the date of the offence charged: *59 Bom 551=A I R 1935 Bom 359=158 I C 168*, **Overruled;** *22 Mad 488* and *10 I C 787*, *Dissent.*; *A I R 1930 Cal 274*, *Foll.* [P 7 C 1, 2; P 8 C 2]

(d) Interpretation of Statutes—Object of legislature—Object is to be gathered from four corners of Act—Speculation of meaning is not allowed.

Although in construing an Act of legislature it is always open to the Court to consider what is the object of the legislature, and if it finds that that object can only be effected by giving some particular section or expression, a meaning other than that which the words literally bear, the Court is justified in doing that amount of violence to the language in order to carry out the object of the legislature; yet the object of the legislature must be ascertained from within the four corners of the Act. It is not open to the Court to speculate as to what the legislature probably meant, and then do violence to the language of the enactment in order to give effect to the presumed intention. [P 7 C 2]

K. McI. Kemp and *B. G. Rao*—for the Crown.

M. N. Talpade and *G. H. Rajadhyaksha*—for Accused.

Order of Reference

Broomfield, J.—This is an appeal by the Government of Bombay in a case in which one Chhotalal Amarchand was tried for offences under Ss. 482, 485 and 486, I. P. C., by the Presidency Magistrate, Third Court, Bombay, and acquitted on the ground that the prosecution was barred by S. 15, Merchandise Marks Act. The complainant in this case is the secretary of G. Griffiths & Co., Ltd., the sole selling agents for this Presidency of a preparation for infants styled "Woodward's Celebrated Gripe Water," manufactured by W. Woodward Ltd., of London. The opponent carries on business as a manufacturing chemist at Princes Street in the name of R. Chhotalal & Co., and is the proprietor of Sanghvi Pharmaceutical Works, Bombay. He has put in the market a preparation called "Sanghvi's Gripe Mixture." It is the contention of the complainant that the labels and wrappers in which "Sanghvi's Gripe Mixture" are sold are a colourable imitation of those of the complainant's preparation and calculated to deceive an unwary purchaser. The complainant purchased a bottle of Sanghvi's Gripe Mixture on 1st December 1934. He filed his complaint on 10th December 1934, and a search warrant was issued, in consequence of which 11 dozen bottles of the mixture and a number of wrappers and labels were seized on the accused's premises on 9th January 1935.

The charges framed against the accused were;(1) under S. 482 in respect of the use of a false trade mark on 1st September 1934, (2) under S. 485 in respect of the possession of a counterfeit trade mark on 9th January 1935, and (3) under S. 486 in respect of the possession for sale of Sanghvi's Gripe Mixture bottles on 9th January 1935. The Magistrate in the first instance did not go into the merits of the case. Evidence was given on behalf of the accused to show that he had commenced the sale of Sanghvi's Gripe Mixture, which is alleged to constitute the infringement of the complainant's trade mark, as long ago as 1931. A witness Nanalal Girjashankar in the employment of the accused was examined, and he swore that the accused had been preparing Sanghvi's Gripe Mixture since 1931. He also produced entries in books of account purporting to show sales of the mixture in November 1931. This evidence was obviously intended to show that the sale of this gripe mixture by the accused had been going on continuously since 1931. There was no cross-examination of the witness whatever. The Magistrate therefore took the view, as I think he was justified in doing, that the first infringement of the complainant's trade mark had taken place more than three years before the prosecution was launched; and following the construction placed upon S. 15, Merchandise Marks Act, by this Court in 37 Bom L R 580[1] he held that time had begun to run against the complainant from 10th November 1931, when the first infringement was proved to have taken place, and that therefore the prosecution was barred under S. 15. The accused was accordingly acquitted. If the law is correctly laid down in 37 Bom L R 580[1] it may be that the acquittal of the accused was right. That is not altogether free from doubt, because in that case it was proved that there had been a continuing infringement to the knowledge of the complainant, and he had not filed his complaint until more than a year after he first came to know of the infringement. In the case before us now there is no evidence to show that the complainant had any knowledge of the infringement of his trade mark until December 1934.

However it is contended on behalf of the Crown that 37 Bom L R 580[1] was incorrectly decided, and that time runs in every case under S. 15, Merchandise Marks Act, from the date of the particular offence specified in the charge, and that it makes no difference whether the infringement has or has not been continuing before that date, or whether it was to the knowledge of the complainant or unknown to him. The learned Advocate-General has requested that in view of the importance of the question, and in view of the conflict between the High Courts on it, it should be referred for the consideration of a Full Bench.

As the Magistrate had not dealt with the case on the merits, we thought it desirable to send down issues for his findings on the questions of fact. The following issues were sent down : (1) Whether the accused used a false trade mark within the meaning of S. 480, Penal Code. (2) Whether the accused has proved that he acted without intent to defraud—S. 482. (3) Whether the purpose referred to in S. 485 is proved ? and (4) Whether the accused has proved that he acted innocently—S. 486.

The learned Magistrate's findings on these issues are : (1) Yes ; (2) No ; (3) Yes; and (4) No. Only the first of

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1. In re Abdul Satarkhan, A I R 1935 Bom 359 =158 I C 168=36 Cr L J 1372=37 Bom L R 580=59 Bom 551.

these issues, in my opinion, needs any discussion, namely, the question whether it is proved that the accused used a false trade mark within the meaning of S. 480, Penal Code. The description of the complainant's goods is as follows: The bottles containing Woodward's Gripe Water are packed in dark blue wrappers, and labelled with white labels printed in black ink. There is one label on the front side which is printed in English, and one on the back, printed half in Marathi and half in Gujarati. On the front label the words printed on the top are "Important to Mothers" below which is printed a figure of an infant strangling two serpents (presumably the infant Hercules) enclosed in a circle and on each side of the circle are the words "Registered Trade Mark" and "No. 99." Below the figure of the infant, the words "Woodward's Celebrated Gripe Water" are printed, and thereafter, the label contains the description of the gripe water and the directions for its use. Except the words "shake the bottle before opening" and "Wipe screw neck before replacing cap" which are printed crosswise in red ink, the whole front label is printed in black ink. The particular points stressed by the prosecution are apparently the dark blue wrapper, the words "Gripe Water" and the picture of an infant. It is alleged that these features have become closely associated in the public mind with the preparation of W. Woodward, Ltd.

The bottles used by the accused are similar in size, and the wrappers are also dark blue. The accused has printed the words "Infants' Preservative" at the top of his label instead of the words "Important to Mothers," and for the figure of an infant enclosed in a circle, he has substituted a lady and a child, and the words "Trade" and "Mark" appear on each side of the circle. The label is in black ink as in the case of Woodward's label, and the size is almost the same. But the accused's bottles have labels on one side only, and the instructions written on the labels are quite different. The learned Magistrate, after comparing the two, has found as follows:

> Putting the two bottles side by side I find that there are certain differences in the two bottles, but they are of such character as will not prevent an incautious purchaser from mistaking the accused's bottles for that of Woodward's. Further the size of the accused's bottle and the wrapper, the colour of which is also dark blue, are also calculated to mislead an unwary purchaser. It is not by accident that the general get up is similar to that of Woodward; it is by design, and I am satisfied that the accused has used a false trade mark within the meaning of S. 480, Penal Code.

In the course of his judgment he has referred to a number of authorities, and he has stated the law quite correctly. There is in fact no doubt as to the principles which are to be followed,—though there is sometimes considerable difficulty in the application of them. In (1889) 14 A C 550,[2] Lord Herschell said (p. 555):

> . . . . . the eye must be the judge in such a case as this, and the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other.

The same learned Judge pointed out in (1896) 1 Ch 142[3] (p. 147) that mere "differences in detail do not prevent the two designs being essentially the same." Lord Selborne in (1882) 8 A C 15[4] said (p. 18):

> The imitation of a man's trade-mark, in a manner liable to mislead the unwary, cannot be justified by shewing . . . . a person who carefully and intelligently examined and studied it might not be misled.

I take it that, shortly stated, the test is whether there is such a similarity in the trade mark, label and general get-up as might mislead an ordinary purchaser who would not be likely to notice the differences or attach importance to them. The learned advocate who is appointed to defend the accused in this case has contended that passing off goods by imitation of the get-up of the packages is not an infringement of a trade mark within the meaning of S. 480. He referred us to a passage in Gour's Penal Code, Vol. 2, p. 2518. But in the present case the Magistrate does not rely only or mainly on the get-up of the packages. There can be no doubt, in my opinion, that the general get-up is one of the matters which may be taken into consideration in deciding whether the imitation of the trade mark or label is calculated to deceive. In that connexion reference may be made to 16 Bom L R 78.[5]

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[2] Hecla Foundry Co. v. Walker Hunter & Co., (1889) 14 A C 550.

[3] John Harper & Co., Ltd. v. Wright and Butler, etc., Ltd., (1896) 1 Ch 142=65 L J Ch 161=44 W R 274.

[4] Singer Manufacturing Co. v. Loog, (1882) 8 A C 15=52 L J Ch 481=48 L T 3=31 W R 325.

[5] Emperor v. Ganpat, A I R 1914 Bom 128=24 I C 834=15 Cr L J 522=16 Bom L R 78.

We have ourselves compared the two bottles. We are satisfied that the label and get-up on the accused's bottle are an obvious imitation of the label and get-up of Woodward's Gripe Water. The accused indeed, in reply to a question put by the Court, admitted that he had imitated the label. We agree, therefore, with the Magistrate that the accused has marked his goods in a manner reasonably calculated to deceive any unwary purchaser and to cause him to believe that the goods are the manufacture or merchandise of W. Woodward, Ltd.

In view of the findings on the merits, it is clear that the accused must be convicted of the offences with which he is charged, unless the prosecution is barred by S. 15, Indian Merchandise Marks Act. That section runs as follows:

> No such prosecution as is mentioned in the last foregoing section, shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Two views have been put forward of the construction of this section. One view, which has been taken by the High Court of Calcutta, is that the offence there referred to is the particular offence, that is, the offence at a particular time and place, which is specified in the charge: see 57 Cal 1153.[6] The other view, which has been taken by the High Court of Madras in 22 Mad 488[7] and also in two cases decided by the Courts in Burma, is that where the offence of infringement is a continuing one, and no discontinuance is proved, time runs from the first instance of infringement or from the first discovery of the infringement. The authorities were referred to by Divatia, J. and myself in 37 Bom L R 580[1] and we gave reasons for preferring the view taken by the Madras High Court. Without going again into detail, I may say that the chief points in favour of this view seem to me to be these. If "offence" in S. 15 means simply the specific instance of infringement mentioned in the charge, why does S. 15 speak of the "first discovery" of the infringement ? An infringement at a particular time and place obviously cannot be discovered more than once. In 12 Cr L J 246[8] Twomey, J. said (p. 248):

> The word "first discovery" cannot reasonably be applied to the last of a long series of similar offences extending without interruption throughout several years to the knowledge of the prosecutor. In my opinion, they can refer only to the first offence of the series which comes to his knowledge.

The learned Advocate-General says that "first discovery" means no more than discovery, and that though "first" may be superfluous, it would be equally superfluous whichever construction were put upon S. 15. That, I think, is hardly the case. The use of the expression "first discovery" would certainly be far more appropriate if the construction suggested in 22 Mad 488[7] and accepted by this Court in 37 Bom L R 580[1] is correct. The second point is that, on the construction contended for by the Crown, S. 15 would be, not a dead letter altogether, but extremely limited in operation. I do not accept the suggestion that has been made that the language of the section in that case is unintelligible or that the concluding words "whichever expiration first happens" would have no meaning. The meaning of the section would be this. You must prosecute within one year of the discovery of the offence, and if it is a stale offence, that is, if it was committed more than three years ago, you cannot prosecute at all. That is, no doubt, a possible meaning. But if that is the meaning, the limitation clause has no practical effect, unless the offence has already been discontinued. If it is still continuing, you have only to get evidence of a recent infringement, and you can prosecute for it however long it may have been going on. In the majority of cases which come before the Courts, the offence is continuing. It is only rarely that criminal proceedings are taken in respect of an infringement which has been discontinued. There is therefore some difficulty in supposing that the Legislature would have thought it necessary or worthwhile to enact this limitation clause, if the only practical effect would be to stop prosecutions for stale offences in the rare cases where the infringement has been discontinued before the prosecution. The Courts would not be likely to take a very serious view of the matter anyhow. The learned Advocate-General argues that S. 15 is only intended to provide that there should be no prosecution when there is no longer a right of suit. Similarly there is some difficulty in supposing that the Legislature could have intended that it should be open to a complainant to prosecute criminally for an offence of this nature which has been carried on to his knowledge for a long period. In 22 Mad 488[7] there are these observations in the judgment (p. 490):

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[6] Nagendranath Shaha v. Emperor, A I R 1930 Cal 274=1930 Cr C 354=127 I C 555=31 Cr L J 1227=34 C W N 339=57 Cal 1153.

[7] Ruppell v. Ponnusami Tevan, (1899) 22 Mad 488=1 Weir 821.

[8] Mahomed Jewa v. Wilson, (1911) 10 I C 787=12 Cr L J 246.

> Ordinarily the infringement of a trade mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed of resort to the criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction.

In 12 Cr L J 246[8] Twomey, J. said (p. 247):

> The intention of the Legislature will be frustrated if it is held that the owner of a trade mark can stand by for several years while his trade mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been infringement.

I think these considerations undoubtedly have some force. But it must be admitted that they derive much of their force from the facts of those particular cases, where there had been continuous infringement to the knowledge of the complainant. The presumption as to the intention of the Legislature cannot be made with equal validity where, as in the present case, there is no evidence to show that the complainant had any knowledge of the infringement prior to the prosecution. At the same time it is hardly possible to distinguish 37 Bom L R 580[1] altogether on that ground, because if "offence" in S. 15 is to mean the first of a series of offences in one case, it must mean it in the other, that is to say, it must be the first of a series of offences whether the infringement has continued to the knowledge of the complainant or not. The learned Advocate-General has pointed out further difficulty arising from the other provisions of the Merchandise Marks Act, which was not brought to our notice in 37 Bom L R 580.[1] S. 15 of the Act refers back to the preceding section: "No such prosecution as is mentioned in the last foregoing section, shall be commenced," etc. And similarly S. 14 refers back to S. 13:

> On any such prosecution as is mentioned in the last foregoing section, or on any prosecution for an offence against any of the sections of the Penal Code.

The offences referred to in S. 13 include offences under S. 18, Sea Customs Act, 1878. The section provides that certain goods shall not be brought by land or sea into British India, and the goods specified include the following, inter alia counterfeit coins, obscene books, and matches made with white phosphorus. The bar of limitation laid down by S. 15, Merchandise Marks Act, must apply equally to offences under S. 482 and the following sections of the Penal Code, and to the offences referred to in S. 13, Merchandise Marks Act, i. e., offences against S. 18, Sea Customs Act. So that, if we are to hold that there can be no prosecution in the former case, where the offence has been continuing for more than three years or more than one year to the knowledge of the prosecutor, it is arguable that the same must apply in the other case also, and there can be no prosecution for importing counterfeit coins, or obscene books, or matches made with white phosphorus, if the importation has been going on continuously for three years. I am not altogether sure that the continuing or recurring importation of goods by land or sea constituting an offence or offences against S. 18, Sea Customs Act, could be regarded as a continuing offence in quite the same sense as a series of instances of infringement of a trade mark. But the difficulty pointed out by the learned Advocate-General is undoubtedly there, and it is not easy to find a satisfactory answer to it.

For this reason, and for the reason already mentioned that it is a point of general importance on which there are conflicting decisions of the High Courts, I think it desirable that the question should be referred for determination by a Full Bench, and the question should be, I think, in the following form: "What is the starting point of limitation under S. 15, Merchandise Marks Act, in a case where it is proved that the offence of infringement of a trade mark, etc., has been a continuing one? Does time run (a) from the particular instance of infringement specified in the charge, or (b) from the date of the first infringement, whichever expiration first happens?"

Wassoodew, J.—I agree that we should refer this question of law to a Full Bench in the terms proposed by my learned brother for a ruling on the point. The offence with which we have to deal relates to the infringement of trade-mark. The law in regard to such infringement is primarily intended to serve a double object. It is in the first instance designed to protect the customer against deception by palming off on him goods different from those which he intends or believes he is purchasing in the market, and, secondly, to protect traders against loss by the deprivation of profit obtainable from the reputation gained for the goods of their manufacture. It is clear to me upon a careful examination of the two sample bottles of "Gripe Water" and "Gripe Mixture" of the rival traders that apart from the minute differences in detail in the printed matter on the labels there is such a great similarity in the get-up that an unwary purchaser is likely to be misled into buying a bottle different from the one he intends to buy. The learned Magistrate has carefully considered the differences in the wrappers, size, and the picture on the labels, and has rightly come to the conclusion that the accused has used a false trade-mark within the meaning of S. 480, Penal Code. On the merits, therefore, I agree in holding that there is sufficient proof that the offences described under Ss. 482, 485 and 486 have been committed in this case.

The learned Magistrate, however, relying upon the view taken in 37 Bom L R 580,[1] has held that the prosecution is barred under S. 15, Merchandise Marks Act (4 of 1889). The decision in 37 Bom L R 580[1] proceeded on the footing that where the offence of a trade or property mark is a continuing one, in the sense that its continuance was known to the complainant and no discontinuance is proved, time runs under S. 15 from the first instance of infringement or from the discovery of infringement. The head-note in the report does not make the point very clear. That the legislature has set a period of limitation for prosecutions for offences such as these under S. 15, Merchandise Marks Act, cannot be doubted. The point which has presented great difficulty in the consideration of the question of limitation is, what is the *terminus a quo* for prosecutions for offences which in their very nature can be described as continuing offences. If they are not of that description, there can hardly be any difficulty in applying the provisions of S. 15. The diversity of judicial view in Indian Courts is mainly based upon the interpretation of the phrase "commission of the offence" in S. 15.

The Courts, in their interpretation of these words, that they imply the particular offence in the charge in cases such as 32 C W N 699[9] and 57 Cal 1153,[6] and the counter-interpretation in 22 Mad 488[7] and 12 Cr L J 246[8] which is in consonance with the view in 37 Bom L R 580,[1] do not take count of certain difficulty which the learned Advocate-General has placed before us in the application of the provisions of S. 15. Among the obvious difficulties in interpretation, which my learned brother has pointed out, is the difficulty arising from the application of the provisions of S. 15 to offences under S. 18, Sea Customs Act, which fall under the classification of offences to which the decision in 37 Bom L R 580[1] may apply. That will lead to the continuous commission of offences punishable under that Act which the law will be powerless to punish if there was delay in the prosecution of the offenders—a result which, in my view, cannot be imputed to the legislature within its intention. I need not traverse the other grounds covered by the exposition of the difficulties by my learned brother, which lead to manifest inconvenience or absurdity and even to contradiction of the apparent purpose of the Act. When the main object of the enactment is clear, it cannot be reduced to nullity, and it may be necessary even to correct or modify the meaning of the words used. It is sufficient to say that the matter is of such general importance that it is necessary to have a ruling of a Full Bench on the question raised.

OPINION

Beaumont, C. J.—In this case a question is referred to this Court in the following terms:

> What is the starting point of limitation under S. 15, Merchandise Marks Act, in a case where it is proved that the offence of infringement of a trade mark, etc., has been a continuing one? Does time run, (a) from the particular instance of infringement specified in the charge, or (b) from the date of the first infringement or first discovery of infringement, whichever expiration first happens?

The question assumes that you can have a continuing offence in the sense in which you can have a continuing tort, or a continuing breach of contract, and I doubt myself whether the assumption is well founded, having regard to the provisions of the Criminal Procedure Code as to the framing of charges and as to the charges which can be tried at one and the same trial. It is quite clear that you could not charge a man with committing an offence *de die in diem* over a substantial period.

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[9] Akshoy Kumar Dey v. Emperor, A I R 1928 Cal 495=114 I C 131=30 Cr L J 252=32 C W N 699.

The accused was charged with offences under Ss. 482, 485 and 486, I. P. C., in respect of offences which I will refer to by a compendious term as infringements of the complainant's trade mark. The defence which prevailed before the learned Magistrate who tried the case was that the accused had continuously infringed the complainant's trade mark since 1931, and the prosecution was therefore out of time under S. 15. With deference to the referring Court, I do not think that fact was properly proved before the Magistrate, but for the purposes of my judgment I will assume that it was so proved. The matter has been referred to us because there has been a difference of judicial opinion as to the construction of S. 15, Merchandise Marks Act, and there is one decision of this Court, 59 Bom 551,[1] the correctness of which requires to be considered. S. 15, Merchandise Marks Act, is in these terms:

> No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Referring back to the previous section, which again refers back to S. 13, there are three classes of prosecution to which S. 15 applies; first, prosecutions for offences under the Act, secondly, prosecutions for offences under S. 18, Sea Customs Act, and thirdly, prosecutions under the relevant sections of the Indian Penal Code, the present prosecution coming within the latter category. Reading S. 15 in the first place without reference to authority, it appears to me to be perfectly plain that the words 'commission of the offence' mean commission of the offence in respect of which a prosecution is launched, that is to say, commission of the offence charged. On that view of the matter the procedure is perfectly simple. One looks at the charge, which has to specify the date of the offence, and if one finds that that date is more than three years before the commencement of the prosecution, then the prosecution is barred under S. 15, whether or not the complainant had knowledge of the offence. If the offence charged is less than three years, but more than one year, before the date of the prosecution, then the prosecution is barred if the complainant had knowledge of the commission of the offence charged for more than a year before the date of the prosecution. But if, as in the present case, the offence is less than one year from the date of the prosecution, then there is no bar under S. 15. That seems to me to be the literal effect of S. 15, and that is the view of the section which has been taken by the Calcutta High Court in 57 Cal 1153.[6] On the other hand, the Madras High Court in 22 Mad 488,[7] the Rangoon High Court in 12 Cr L J 246[8] and this High Court in 59 Bom 551[1] have taken the view that the offence referred to in S. 15, is not the offence charged where the infringement has continued for a long period, but in such a case the offence under S. 15 is the first offence of infringement committed by the accused.

In order to extract that meaning from S. 15 it seems to me that the section would have to be considerably altered, and in addition to a reference to 'the offence' which, as I have said, must mean the offence charged, there would have to be some such words as "or an offence similar to the offence charged which has continued uninterruptedly down to the date of the prosecution." It is a strong thing to alter the words of the section to that extent. Twomey, J., in the Rangoon case, observes that in construing an Act of Parliament it is always open to the Court to consider what is the object of the legislature, and if it finds that that object can only be effected by giving some particular section, or expression, a meaning other than that which the words literally bear, the Court is justified in doing that amount of violence to the language in order to carry out the object of the legislature. That no doubt is a perfectly sound principle, but I think the learned Judge omitted to notice that the object of the legislature must be ascertained from within the four corners of the Act. It is not open to the Court to speculate as to what the legislature probably meant, and then do violence to the language of the enactment in order to give effect to the presumed intention. There is as far as I can see, nothing whatever in the context of this Act to show that the legislature did not mean precisely what it said in S. 15. Therefore in my view it is not really open to the Court to do anything more than give effect to the plain meaning of the section. We cannot speculate as to whether that meaning correctly carries out what was actually in the mind of the legislature. However, in deference to the referring judgment, I would say that it seems to me that far more difficulties arise from the construction placed upon the section by the Madras High Court, the Rangoon High Court, and this Court than arise under the construction placed upon it by the Calcutta High Court. The only serious objection to the literal construction of the section is this: that if 'the offence' means the actual offence charged, it is unlikely that a prosecution will be launched in respect of an offence which took place more than three years ago, and the section is likely therefore to have only a limited application. That may be so, but that is not a sufficient reason for not giving the section its proper meaning.

On the other hand, there would be very serious difficulties in the way of the other construction contended for. I have noticed the initial difficulty that the section would have to be largely redrafted. Apart from that, I think there would be great practical difficulty in determining whether there had been a prior infringement. For example, where a prosecution is launched in respect of an infringement taking place in 1935, and the defence is that a similar infringement took place in 1931, and has continued ever since, the Court would have to try whether the act of 1931 amounted to an infringement or not. All that the Magistrate held in this case was that the accused had sold his goods under the name of 'gripe water' in 1931, but it has not been established that the complainant has a monopoly in the use of those words, and the Magistrate should have gone further, and inquired whether the sale in 1931 was in such circumstances as to lead to deception, that is, as to pass off the accused's goods as the complainant's goods. Now dishonest traders who are minded to take for themselves the reputation of a rival trader very often proceed to their object by progressive stages. They start with a make-up which has points of dissimilarity from the rival make-up, and, if they are not attacked, they gradually approach nearer to the make-up of their rival; and a Magistrate might well find himself compelled to try, first of all, whether the infringement alleged by the accused in (say) 1931 amounted to an infringement, and if not, whether, on rather different evidence, there was an infringement in 1932 or in 1933, and so on. The Court might have to try a succession, in effect, of passing off claims each one based on different evidence. Furthermore, I feel great difficulty in supposing that the legislature intended to confer upon a person a prescriptive right to commit an offence made criminal under the Indian Penal Code. It might very well happen that an infringer carried on his infringing business for more than three years in a place far removed from the place where the complainant carried on his business. The complainant might never hear of the infringement, or if he did hear of it, might think it not worth while to interfere. But it can hardly be suggested that after carrying on his infringing business for three years without doing the complainant any particular harm, the infringer could then come and set up his business, next door to the complainant with complete immunity so far as any action under the criminal law is concerned. Those are reasons which suggest that in all probability the legislature really meant what it said when it enacted S. 15, but for the reasons I have already given, I think speculations of that kind are really not permissible, because, in my view, the language of S. 15 is perfectly plain, and there is nothing in the rest of the Act to control the natural meaning of the words, and all we can do, therefore, is to give effect to them. In my opinion, we should answer the question propounded by saying that in all cases the starting point of limitation under S. 15 is the date of the offence charged. It follows that the case in 59 Bom 551[1] was wrongly decided, and must be treated as overruled.

Rangnekar, J.—The section is by no means easy of construction and there are obvious difficulties in adopting either of the two constructions pressed upon us. The difficulties have been fairly set forth in the referring judgment as also in the reported decision in 59 Bom 551,[1] and it is not necessary now to refer to them again. The position shortly seems to me to be this. Upon the construction pressed for by the learned Advocate-General, the position will be that a man may be infringing the trade mark of another person for a number of years—more than three years prior to the complaint lodged against him by the latter, although the latter may be ignorant of such infringement and may have launched his prosecution within one year from the date when he discovered an instance of such infringement in respect of which the complaint is made. On the other construction, the position is that a man may be infringing the trade mark of another person for more than three years, and even if the complainant is ignorant of such infringement, either by reason of his absence from the market in which the infringement has been going on or by reason of various other circumstances, the infringer will get a statutory right to go on with such infringement. Upon the first construction, the difficulty, which might arise, is as regards the language in the latter part of the section; and I think there is force in the contention that in that case the words "first discovery" and the word "first" particularly would be superfluous, as also the words "whichever expiration first happens," because, although theoretically it is possible that a person may charge another with an infringement in respect of an instance of infringement which occurred more than three years ago, from all practical points of view such a prosecution can never arise. On the other hand, to adopt the other construction, the section clearly would have to be re-cast and in place of the words "commission of the offence" words to the effect "commission of a similar offence" or "commission of the first infringement of the offence in respect of the particular trade-mark" will have to be inserted. These then are some of the difficulties which arise in construing this section.

The learned advocate for the accused has pressed upon us that in accepting the first construction we shall be defeating the object of the legislature. Now, as I understand the law, the object of the legislature is to be gathered within the four corners of the Act, and primarily upon the language of the statute. But even supposing that the object of the legislature was to afford a speedy remedy to traders against a wrongdoer, it is difficult to see how that object can be carried out by adopting the second construction, where, for no fault of his, he may be entirely ignorant that his trade mark has been infringed. It seems to me that "the offence" in S. 15 must necessarily mean the offence charged, or which is the subject matter of the complaint in regard to which the question of limitation is raised, and upon the whole I have reached the conclusion that it would be safer to adopt the first construction and to hold that limitation starts from the offence charged in the complaint. I therefore, agree that the question propounded should be answered in the manner proposed by my Lord.

N. J. Wadia, J.—The language of S. 15 of the Act clearly suggests that "the offence" referred to in it could only mean the offence charged and not the first of a series of offences when the offence is a continuing one. To put the latter construction on the section it is necessary to read into it words which it does not contain. In 22 Mad 488[7] and in 12 Cr L J 246[8] the complainants were aware of the commission of the offence more than three years before the complaint was lodged, and the learned Judge thought that if the aggrieved persons had failed to resort to the criminal Courts within a year it could be assumed that the case was not one of urgency and they could be left to their civil remedy by an action for injunction. That argument however could not apply to the case before us in which the complainant has alleged—and his allegation has not been challenged—that he first discovered the offence on 1st December 1934, and the complaint was lodged within ten days. It would be a straining of the language of the section to hold in such a case that, though the offence which the complainant alleged had been committed in December 1934, his complaint must be taken to refer to some similar offence committed four years earlier in 1931, which he had not alleged, of which he was not aware, and of which, therefore, he could not possibly have complained. Broomfield, J. in his referring judgment has said that the view taken in the Madras and Burma cases derives much of its force from the facts of those particular cases where there had been continuous infringement to the knowledge of the complainant. There is a further difficulty involved in that view. It could not always be possible to say with certainty that when the false trade mark or property mark was first used it was of the same kind as the one actually complained of.

The fraudulent imitation of the genuine article may, and probably would, in most cases, be in the beginning so slight as to escape detection or be difficult of proof. It would only be after lapse of time had given confidence and increased the temptation that the imitation would approach so close to the genuine article as to attract the notice of the complainant, or to cause such loss to him as would make it worth his while to prosecute. To say that in such cases he would be debarred from prosecuting if the accused could show that he had commenced committing the offence more than three years before the complaint was filed would result in depriving the complainant in most cases of the remedy which the Act provides. In my opinion the view taken in 59 Bom 551,[1] is not one borne out by the language of the section. I, therefore, agree with the answer proposed to be given.

B.D./R.K. *Reference answered.*

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BROOMFIELD AND WASSOODEW, JJ.

In re *Jafferbhai Hasam*—Applicant.

Criminal Revn. No. 98 of 1936, Decided on 9th July 1936, from order of Hony. Presidency Magistrate, Mazagaon, Bombay.

Bombay Tobacco Duty (Town of Bombay) Act (4 of 1857), S. 18—Order under S. 18, confiscating vehicle should not be passed without giving notice to owner—Court must be satisfied that owner consented or knew that vehicle was used for illegal purpose — Mere consent of servant to illegal use and his conviction is not sufficient to impute owner with notice.

An order under S. 18, confiscating a vehicle, should not be passed without giving notice to the owner. Although the provisions contained in S. 18 leave it to the Court's discretion to confiscate the vehicle or not, that discretion has to be judicially exercised. That discretion can only be properly used after hearing the owner and ascertaining whether he had given his consent or knew the use to which the vehicle was put. The Court must be satisfied whether the owner had consented or knew that the vehicle was used for the said illegal purpose. From the mere fact that the servant has consented to illegal use and has been convicted for the offence it cannot be assumed that the servant was representing his master so as to do away with the necessity of notice to owner for his act might be outside his employment. [P 10 C 2]

M. M. Kotasthane—for Applicant.

B. G. Rao—for the Crown.

Wassoodew, J.—The petitioner whose motor-car has been ordered to be confiscated by the Honorary Presidency Magistrate under S. 18, Tobacco Duty (Town of Bombay) Act (4 of 1857) on the ground that it was employed in conveying tobacco contrary to the provisions of the said Act has applied to set aside that order as no notice had been given to him by the Magistrate prior to the order of confiscation. Three persons, including the petitioner's driver, were convicted on their own plea for an offence under S. 19, Tobacco Duty Act, for illegal importation of tobacco on 13th January 1936. The order of conviction and confiscation of the car was passed on 23rd January 1936. The petitioner was not among the persons prosecuted and was not heard before the order of confiscation was made. The petitioner applied to the Magistrate on 14th March 1936 to revise that order of confiscation. That application was rejected without reasons on 19th March 1936. The provisions of the Act relating to confiscation of the vehicle in which tobacco is illegally imported or conveyed are contained in S. 18, and they are as follows:

> . . every vehicle, boat or animal employed with the consent and knowledge of the owner or his servant in conveying the same, [tobacco] (contrary to the provisions of the Act) shall be liable to confiscation.

Undoubtedly, those provisions leave it to the Court's discretion to confiscate the vehicle. That discretion, therefore, has to be judicially exercised. In other words, the Court must be satisfied whether the owner had consented or knew that the vehicle (here the motor-car) was used for the said illegal purpose. According to elementary principles of natural justice, that discretion could only be properly used after hearing the owner, and ascertaining whether he had given his consent or knew the use to which the vehicle was put. It has been urged for the Crown that according to the plain and natural interpretation of Cl. (3) of S. 18, there is no necessity to give notice to the owner, where it is demonstrably clear that his servant has consented to such use. The interpretation of that clause is by no means free from difficulty. The obvious interpretation is that when the servant, in the course of his employment, has consented to the illegal use, it would be sufficient to justify the order for it could be presumed that he was representing his master. That representation could not be assumed merely upon the conviction of the servant for the offence; for his act might be outside his employment. That is the natural construction of the words used. Any other interpretation would involve an obvious hardship to the owner which cannot be imputed to the legislature within its intention. Our attention has been drawn to the provisions relating to confiscation under the Opium Act (1 of 1878) and the authorities under S. 11 which insist upon the giving of notice to the owner prior to the confiscation of his vessel. There is a clear difference between the provisions of S. 11, Opium Act, and those with which we have to deal in the present case, for there is no provision in the Opium Act for ascertaining the consent and knowledge of the owner or the servant before confiscating the vehicle conveying the illegal opium. Consequently the cases decided under S. 11, Opium Act, to which we were referred, could not be regarded as authority in support of the petition. But the principle underlying those cases is the principle which we think should be applied to all cases to be decided in accordance with instinctive justice, which cannot always find expression in detailed rules.

But it was pointed out for the Crown that there is a special proviso in Cl. (3) of S. 12, Opium Act, which requires that persons claiming any right in the articles to be confiscated must be heard before an order of confiscation can be passed; and it was contended that as there is no such proviso to S. 18, Tobacco Duty Act, the legislature intended that the order of confiscation should be made without hearing the persons concerned. That clause of the Opium Act perhaps refers to confiscation authorised by the Act in Cl. (2) thereof. But even then the absence of such a proviso in the Tobacco Duty Act would make no difference, in our opinion, as regards the necessity for hearing the parties concerned. The discretion has to be exercised upon discovery of the part which the owner has taken in the use of his conveyance; and the Court is given the option to mitigate the rigour of confiscation by commuting the same to fine. That is an additional reason why the owner should be heard. We think the omission to give notice to the owner has resulted in injustice. We, therefore, set aside the order of confiscation, and direct that the papers should be returned to the Magistrate with a direction to give notice to the petitioner before exercising his discretion under S. 18, Tobacco Duty Act.

Broomfield, J.—The principal argument on behalf of the Crown is that under S. 18 of the Act knowledge of the servant (chauffeur in this case) is enough to justify confiscation of a car used for the illegal transport of tobacco even if the master is ignorant of the matter. It would certainly seem—having regard to the way the section is worded—that the consent and knowledge of the servant may be enough to give the power to confiscate. The question is, however, whether it is enough to justify the exercise of the power. The section says "liable to confiscation," not "shall be confiscated." It would obviously be arbitrary and unjust in many cases to confiscate a man's motor-car by reason of its illegal use by his servant, without there being any evidence or reason to suppose that the owner himself was cognisant of the illegal use. It might be said in the present case that the applicant was heard by the Magistrate, though he was heard after the order of forfeiture was made and not before. It is not clear whether the Magistrate refused the application on the merits or because he had no power to revise his own order. However, this is not really material. We are revising the order of confiscation and not the order refusing the latter application. I agree with the order proposed by my learned brother.

R.M./R.K. *Order set aside.*

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BROOMFIELD AND WASSOODEW, JJ.

Kalabhai Mahomedalli — Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 145 of 1936, Decided on 14th July 1936, against conviction by Sess. Judge, Panchmahals.

(a) Petroleum Act (8 of 1899), S. 15—Person merely ordering petroleum with intention of having it stored on licensed premises belonging to another and having no intention of storing it, is not required to have license.

A person, who has no intention of storing or keeping petroleum but who merely orders it with the intention of having it transported and stored on licensed premises belonging to another person, is not required to have a license for storage and possession under S. 6 or the rules framed thereunder and he cannot be convicted under S. 15 for failing to possess one. [P 12 C 2]

(b) Petroleum Act (8 of 1899), S. 9—Powers of Government to make rules.

The Government cannot make a rule requiring that persons must have a license except for the purpose of possessing or transporting or for the purpose of possessing or transporting except as provided in the Act. [P 13 C 2]

U. L. Shah—for Applicant.

B. G. Rao—for the Crown.

Broomfield, J.—The applicant in this case was convicted of an offence under S. 15, Petroleum Act 8 of 1899, and fined Rs. 51. His appeal was dismissed by the Sessions Judge. There were two accused persons originally. The applicant was accused 1. The charge against him was that he transported 20 cans, i. e., 40 gallons of petroleum from the Burma Shell Depot at Baroda by rail to Godhra without a storage license as required by the Act and rules. The charge against the other accused was that in contravention of the provisions of the Act and rules he was in possession of petroleum for which there was no license. The Sessions Judge acquitted accused 2, and we are not concerned with his case. It appears that he had a license for the storage of petroleum. The contention of the applicant-accused 1 was that he had sold the petroleum to accused 2 who, as I say, possessed a storage license and that immediately on arrival of the petroleum at the railway station at Godhra he had asked the carting agent to take it to accused 2's godown where it was stored. The story that he had sold the petroleum to accused 2 has been disbelieved. But it is apparently a fact that he did not take possession of the petroleum but had it immediately conveyed to the premises of a person who had a license for storage. The question is whether under these circumstances it was necessary that accused 1 should himself have a license for storage or possession, and after examining the provisions of the Act and the rules which have been pointed out to us, we are of opinion that it was not necessary.

One of the complaints which accused 1 made in his appeal was that the charge had not been framed in such a way as to give him reasonable notice of the offence he was alleged to have committed. The judgment of the trial Magistrate merely refers to S. 15 of the Act, which is the general section providing a punishment for breaches of the rules. No particular rule is referred to by him in his judgment. Nor has he referred to any section of the Act except S. 15. However, it was a summons case and it is possible that the charge may have been explained to the accused. We cannot help feeling some little doubt as to that because the complaint, though it refers to Ss. 5 and 6 of the Act, does not refer to any particular rules which are alleged to have been broken, and even in this Court we have had considerable difficulty in ascertaining from the learned Assistant Government Pleader what exact offence the accused is supposed to have committed.

It is clear however for a start that the conviction is supposed to be based in some way on S. 6. S. 6 provides that no quantity of dangerous petroleum equal to, or less than 40 gallons shall be kept or transported without a license. Ch. 4 of the rules framed under S. 9 of the Act deals with licenses for the possession of petroleum. The only rule to which our attention was drawn was R. 4 which provides that licenses for the possession of dangerous petroleum in quantity not exceeding 40 gallons may be granted in Form C. Form C is the ordinary license to possess dangerous petroleum in quantity not exceeding 40 gallons. It is a license for the storage of a specified quantity of dangerous petroleum in a storage shed which is to be described below the license. There seems to be no provision for a license to possess other than the storage license and if the contention of the Crown in this case is correct and it was necessary for the accused as consignee to have a storage license, then it was also necessary for him to have a storage shed to be described in the license itself. Prima facie, however, a person who has no intention of storing or keeping petroleum but merely orders it with the intention of having it stored on licensed premises belonging to another person is not required to have a license under S. 6 or the rules framed thereunder.

The rules as to transport are contained in Ch. 5. Rr. 1 and 2 provide for the issue of general licenses for the transport of petroleum. R. 4 provides that the holder of a general license granted under Rr. 1 and 2 (or 9, with which we are not concerned) shall, with each consignment of petroleum conveyed under cover of his license, issue to the person who takes charge of the petroleum for the purpose of transporting it, a numbered pass in Form I. Now it is an admitted fact that the Burma Shell Company have a general license for the transport of petroleum and they did issue a pass for transport in this case under R. 4. The pass issued was in Form I, as originally prescribed, but that Form has been recently amended by a Government Resolution of 25th April 1933, and the Form as amended states that the pass covers the specified number of gallons of dangerous or non-dangerous petroleum consigned to so and so, the holder of a license in Form . . . . to possess . . . . . gallons of dangerous or non-dangerous petroleum while in transport from such and such to such and such place. The argument on behalf of the Crown appears to be that this Form which has been sanctioned by Government requires that petroleum shall not be consigned to any person by the holder of the license to transport unless the consignee has a license to possess.

There are several difficulties in the way of this contention. In the first place R. 4 of Ch. 5, which I have read, would, according to its natural construction, refer to a pass to be given to the carrier or the person who conveys the goods from the consignor to the consignee. It is difficult to see how the words "the person who takes charge of the petroleum for the purpose of transporting it" could be applied to the consignee, i. e., to the accused in this case, for he did not take charge of the petroleum for the purpose of transporting it, even if he can be said to have taken charge of it after it had been transported and had arrived at Godhra. All that the pass in the amended form seems to require is that the consignee should have a license in some form to possess the petroleum while in transport from one place to the other, and not after arrival at the destination. Moreover, even if we assume that the effect of this amended form of transport pass is to require that the consignee must have a license to possess or store, it by no means follows that accused 1 has been guilty of the breach of any provision in the Act or rules. Apparently he was not in any way responsible for the fact that the Burma Shell Company issued the pass in the old form and not in the amended form.

In this connexion a question also arises as to whether Government have power to make a rule imposing the obligation of having a storage license on a person who orders petroleum not for the purpose of possessing or storing it himself but with the intention of having it stored on the licensed premises of another. The rule-making power is contained in S. 9 of the Act :

> The Local Government, with the previous sanction of the Governor-General in Council, may make rules to regulate the importation of petroleum and the granting of licenses to possess or to transport petroleum within the Province in cases in which such licenses are by law required.

We are not concerned with the importation of petroleum. "To import" is defined in S. 2 (c) as meaning to bring into British India by sea or land. Now the petroleum was consigned in this case from Baroda, but we are informed on behalf of the Crown that the railway yard at Baroda from which it was despatched is in British India. Therefore it is a case of transporting and not of importing. Rules may be made regulating the granting of licenses to possess or to transport but only in cases in which such licenses are by law required. It is obvious therefore that Government cannot make a rule requiring that persons must have a license except for the purpose of possessing or transporting, or for the purpose of possessing or transporting except as provided in the Act. It may be that by way of regulating the grant of licenses to transport it is within the power of Government to provide that petroleum shall not be consigned to a person not possessing a storage license. But assuming that to be so, and assuming that that is what the amended form I means, it is not the accused who has been guilty of the breach of a rule but the Burma Shell Company which consigned the petroleum to him.

In my view it cannot reasonably be said that the accused either kept or transported petroleum in the circumstances of the present case. No doubt the definition of "transport" in S. 2 (d) is a very wide one : "transport" means to remove within British India from one place to another. It would make no difference however, in my opinion, even if we were to hold that the accused comes within the definition of transporter, for it is not suggested that he required a license for the transport of the petroleum. It was validly transported under the general license possessed by the Burma Shell Company, and it is conceded by the learned Assistant Government Pleader that everything would have been regular and in order if only the accused had himself possessed a license for storage of the petroleum consigned to him. This the law does not seem to require. We think therefore that the conviction of the accused must be set aside and the fine refunded. It follows that the order of confiscation must also be set aside and the petroleum should be returned to the person from whose custody it was taken, i. e., accused 2.

R.M./R.K. *Conviction set aside.*

A. I. R. 1937 Bombay 14

BROOMFIELD AND WASSOODEW, JJ.

Emperor

v.

Mallappa Tejappa Bidikar and *others*.

Criminal Revn. No. 90 of 1936, Decided on 13th July 1936, against order of Addl. Sess. Judge, Belgaum.

Criminal P. C. (1898), S. 195 (1) (c)—Accused must be party to some proceeding—'Party'—Guardian not party.

Section 195 (1) (c) cannot apply unless one of the accused is a party to some proceedings in Court. The word 'party' is to be strictly construed without giving it any unusual or extended sense. It does not include the guardian or next friend of a minor who is a party to a suit : *A I R 1931 Cal 438* ; *30 All 55* and *3 Mad 4*, *Rel. on.*
[P 14 C 1, 2]

B. G. Rao—for the Crown.

A. G. Desai and *G. R. Madbhavi*—for Accused Nos. 1 to 5.

Broomfield, J. — In our opinion the learned Additional Sessions Judge, Belgaum, was wrong in holding that a complaint from the Mamlatdar, Khanapur, was necessary in this case. His reason for making the order was that accused 3, one of the persons alleged to have abetted the forgery of a sale-deed which was the subject matter of the criminal case committed for trial before the Additional Sessions Judge, had instituted an assistance suit before the Mamlatdar as the guardian of a minor in whose favour the sale-deed was passed. S. 195 (1) (c), Criminal P. C., provides that :

> No Court shall take cognizance of any offence described in S. 463 or punishable under S. 471, S. 475 or S. 476 (of the Penal Code) when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding.

The sale-deed, it appears, was produced in the assistance suit, which, I may mention, had been disposed of before the committing Magistrate took cognizance of the criminal complaint of forgery. S. 195 (1) (c) cannot apply unless one of the accused was a party to some proceeding in Court. Accused 3 was merely the guardian or next friend of the minor plaintiff in that proceeding. The guardian or next friend is not a party, as has been held in 30 All 55,[1] 7 Cal 137[2] and 3 Mad 4[3].

The learned advocate who appears to oppose this application by the Crown has conceded that strictly speaking the guardian or next friend cannot be regarded as a party. But he urges that when the word "party" is used in S. 195 (1) (c), it is not used in a strict or technical sense, but is used generally to mean or include any person participating in or interested in litigation. Once, however, one were to take the view that the word is used in such a general sense, it would be difficult to know where to draw the line. We are are of opinion that there are no good grounds for holding that the word "party" is used in this section in any unusual or extended sense, and we respectfully agree with the observations of Rankin, C. J. to that effect in 58 Cal 727.[4]

It is suggested that there is another objection to the order of the learned Additional Sessions Judge. As I have mentioned, the civil proceeding in which the sale-deed was produced had terminated at the time the Magistrate took cognizance of the criminal complaint. As pointed out in 38 Bom L R 440,[5] the material time in construing S. 195 is the time at which the Court is asked to take cognizance of a criminal offence. In that particular case it was not necessary to determine whether S. 195 (1) (c) would apply if the proceedings in Court had terminated, so that the accused had only previously been a party to a proceeding, and was no longer a party at the time S. 195 (1) (c) was sought to be applied. In the present case it is not really necessary to decide that question either, because we hold that accused 3 was not a party to the proceeding at all. But we may say that we are disposed to take the view that the words, "committed by a party to any proceeding in any Court" in S. 195 (1) (c) imply that the proceeding must be pending at the material time. To hold otherwise might lead to rather absurd results. Between the commission of a forgery and the discovery of it a long time may elapse, and in the interval the document may be produced in many proceedings. It might be highly inconve-

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1. Rup Chand v. Dasodha, (1907) 30 All 55=(1907) A W N 290.
2. Khodabux v. Budree Narain Singh, (1881) 7 Cal 137=8 C L R 306.
3. Regina v. Padala Venkatasami, (1881) 3 Mad 4.
4. Prabhatranjan Barat v. Umashankar Chatterji, A I R 1931 Cal 438=1931 Cr C 590=132 I C 241=32 Cr L J 883=58 Cal 727=35 C W N 98.
5. Emperor v. Rachappa Yellappa, A I R 1936 Bom 221=1936 Cr C 627=163 I C 279=37 Cr L J 814=38 Bom L R 440.

nient to have to obtain a complaint from each of the Courts in respect of proceedings terminated, possibly many years before. We set aside the order of the Additional Sessions Judge, and direct that he do proceed with the trial of the case.

B.D./R.K. *Order set aside.*

✻ A. I. R. 1937 Bombay 15

RANGNEKAR, J.

In re *Strauss & Co., Ltd.*

Bhimraj Harlalka—Petitioning Criditor.

Insolvency Case No. 6 of 1935, Decided on 16th April 1935.

✻ (a) Companies Act (1913), Ss. 270 and 271—Foreign unregistered company—Order for winding up company made by competent Court of place of Company's incorporation—High Court has jurisdiction to make order for winding up the company irrespective of the number of its members.

First part of S. 270, Companies Act, gives definition of the expression "unregistered company." Then the second part does not tell what bodies will fall within the expression 'unregistered company,' but some particular kinds of bodies would be included within the expression. As a matter of construction it is clear that the section is not exhaustive. The words "shall include" do not amount to "shall mean and include." [P 16 C 2]

Therefore "company" in this part of the section can only and must mean a body which has no corporate existence not being registered under the Act. But a foreign company is a corporate body and a legal entity and under the law it can sue and be sued as such. The words "shall include" will not exclude a foreign company not registered under the Act and such company must fall within the expression "unregistered company" whatever may be the number of its members. [P 17 C 1]

High Court has jurisdiction to wind up an unregistered foreign company irrespective of the number of its members under Ss. 270 and 271, and the mere fact that the order for winding up the company has been made by a competent Court of the place of the Company's incorporation cannot make any difference to the jurisdiction : *Case law discussed: A I R 1931 Ran. 77 (which Overruled A I R 1930 Rang 337), Dissent.* [P 18 C 2]

✻ (b) Interpretation of Statutes—The word 'include' in interpretation clause is enumerative and not exhaustive.

The word 'include' in the interpretation clause is intended to be enumerative and not exhaustive. It has an extending force and it does not limit the meaning of the term to the substance of the definition. When it is intended to exhaust the signification of the word interpreted the word 'means' is used. [P 16 C 2]

V. F. Taraporewala, B. J. Desai and *K. T. Desai*—for Petitioning Creditor.

M. A. Jinnah, J. H. Vakeel, B. K. Desai and *A. C. Amin*—for Various Opposing Creditors.

Order.—This petition raises a somewhat difficult and important question under Ss. 270 and 271, Companies Act, 1913. In form the question is whether this Court has jurisdiction to make a winding up order against an unregistered foreign company not consisting of more than seven members. The facts which do not seem to be in dispute are briefly as follows : The respondent company was incorporated in England with limited liability under the English law. It carries on business in India and its principal place of business in India is situate in Bombay. It was stated in the petition that the company consisted of more than seven persons, but it is now admitted that that statement was made inadvertently and that the company consists of five members only. The petitioning creditor is a creditor in the sum of about Rs. 60,000 and admittedly there are other creditors whose claims exceed that of the petitioning creditor. The petition is founded upon the allegation that the company has stopped payment and has ceased to carry on business, and this is not disputed. From the affidavits made at a later stage of the hearing of this petition, it appears that a winding up petition was presented against the company in England on 29th January 1935, and an official liquidator was appointed. The actual winding up order was made on 11th February 1935, that is five days after the presentation of the present petition to this Court. From the report made by the official liquidator in England it appears that there are heavy liabilities of the company and a heavy deficit, and that the unsecured creditors in England are not likely to get even half a shilling in a pound. The company has more than forty branches in India and used to carry on extensive business in Bombay, Karachi, Madras and other places in India. The main question which is raised is as regards the jurisdiction of this Court. The material sections are Ss. 270 and 271. S. 270 is in these terms :

> 270. For the purposes of this Part, the expression 'unregistered company' shall not include a Railway Company incorporated by Act of Parliament or by an Act of the Governor-General in Council, nor a company registered under the Companies Act, 1866, or under any Act repealed thereby, or under the Companies Act, 1882, or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

Section 271 provides that subject to the provisions of this Part (i. e. Part 9), any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with certain exceptions and additions, to which it is not necessary to refer. These two sections are placed in Part 9 of the Act, the heading of which is "Winding up of unregistered companies." The expression 'company' is defined in S. 2 (2) as meaning a company formed and registered under this Act or an existing company. Sub-s. (7) defines "existing company" as follows :

> (7) 'Existing company' means a company formed and registered under the Companies Act 1866, or under any Act or Acts repealed thereby, or under the Companies Act, 1882.

Having regard to the definitions, it seems to me to be clear that the expression 'company' under Ss. 270 and 271 has a wider meaning. Under the English Act of 1862, S. 199, it was held that an unregistered company could not be wound up under that Act unless there were more than seven members : (1895) 1 Ch 663.[1] Then came the Act of 1908, which by S. 267 gave a definition of the expression "unregistered company" materially different from that contained in S. 199 of the Act of 1862. The Act of 1908 was followed by the Act of 1929, and the corresponding section in that Act is S. 337, which is in the terms following :

> **337.** For the purposes of this Part of this Act, the expression 'unregistered company' shall include any trustee, savings bank certified under the Trustee Savings Bank Act, 1863, and any partnership, whether limited or not, any association and any company with the following exceptions : (1) a railway company incorporated by Act of Parliament, except in so far as is provided by the Abandonment of Railways Act, 1850, and the Abandonment of Railways Act, 1869, and any Acts amending them ; (2) a company registered in any part of the United Kingdom under the Joint Stock Companies Acts or under the Companies Act, 1862, or under the Companies (Consolidation) Act, 1908, or under this Act ; (3) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company ; (4) a limited partnership registered in England or Northern Ireland.

As observed by Palmer in his Company Precedents, Vol. 2, Edn. 14, at p. 48, the definition of "unregistered company" in this Act differs from that contained in S. 267 of the Act of 1908, especially in providing that a partnership, association or company which consists of not less than eight members is not an unregistered company unless it is a foreign partnership, association or company. S. 270, Companies Act, is in the same terms as S. 267 of the English Act of 1908. S. 270, I think, consists of two parts. It begins by stating what will not be included in the expression "unregistered company," and the excepted bodies are : a Railway Company incorporated by Act of Parliament or by an Act of the Governor-General in Council, or a company registered under the Companies Act, 1866, or under any Act repealed thereby, or under the Companies Act, 1882, or under the Companies Act of 1913. If the section had stopped there, it is clear that the respondent company, which is a foreign unregistered company, could not be brought within the exception, and would be included within the expression "unregistered company." The marginal note of the section is : "Meaning of 'unregistered company'." In my opinion, the section, as far as it goes and confined to what I called the first part of it, is a definition of the expression "unregistered company." Then the second part does not tell us what bodies will fall within the expression "unregistered company," but that some particular kinds of bodies would be included within the expression. As a matter of construction it is clear that the section is not exhaustive. The words "shall include" do not amount to "shall mean and include." It is well established that the word "include" in the interpretation clauses is intended to be enumerative and not exhaustive. It has an extending force and it does not limit the meaning of the term to the substance of the definition. When it is intended to exhaust the signification of the word interpreted, the word "means" is used. Therefore, this part of the section merely says that a partnership, association or company consisting of more than seven members is an unregistered partnership, association or company. It is clear, therefore, that other partnerships, associations or companies may be included within the expression "unregistered company."

The scheme of the Act seems to me to be clear. The first part tells us as to what is not included within the expression "unregistered company," and generally speaking it brings within the exception bodies incorporated under the Acts specified, that is to say, bodies which have a corporate existence. If the section had

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1. In re Bowling and Welby's Contract, (1895) 1 Ch 663=64 L J Ch 427=72 L T 411=43 W R 417=2 Manson 257.

stopped there, it follows that bodies which are not incorporated under any of the Acts thus specified must be included within the expression "unregistered company," as far as the Act is concerned. A foreign company, though registered outside British India, but which is not registered under this Act, will then be an unregistered company under the Act. The procedure for getting such companies registered under this Act is laid down in S. 277. Then, in juxtaposition to this part, the second part tells us what would be included within the expression "unregistered company". Taking these, namely, a partnership, association or a company consisting of more than seven persons, it must mean that they refer to bodies which are unincorporated bodies but carrying on business and having no corporate existence. It was clearly necessary to include such bodies within the expression "unregistered company." If this had not been done, a partnership or association of say nineteen persons carrying on a business other than banking, or of nine persons carrying on the business of banking (see S. 4), would be able to carry on its business without the creditors being entitled to have its affairs wound up under the Act,—a relief to which they would be entitled if such bodies fell within the expression "unregistered company."

In my opinion, therefore, "company" in this part of the section can only mean and must mean a body which has no corporate existence, not being registered under the Act. But a foreign company is a corporate body and a legal entity, and under the law it can sue and be sued here as such. The words "shall include" in the second part of the definition will not exclude a foreign company not registered under the Act, and such a company must fall within the expression "unregistered company." If I am right in holding that the words "partnership, association or company" in the second part of the section refer to an agglomeration of individuals which is not incorporated or registered in India, then it must follow that a foreign company which is not registered here is included within the expression "unregistered company." It seems to me that the whole scheme of the section is this: that all bodies having corporate existence under the Acts in force in India do not come within the meaning of unregistered company; but all bodies having no corporate existence under those Acts are included within the expression "unregistered company." The second part of the section has merely an extending force. Therefore, in my judgment, a foreign company whatever the number of its members may be, which is not registered here, will come within the second part of the section and will be an unregistered company for the purposes of this part of the Act. I may also refer to S. 107, Presidency Towns Insolvency Act. The effect of that section is that an insolvency petition cannot be presented against a company incorporated and registered under any Act in force. Therefore a foreign company not registered in India can be proceeded against in insolvency. But the relief in insolvency is less wide than that available if a company is wound up under the Companies Act, and I see no reason nor any principle why an unregistered foreign company should not be wound up under the Companies Act. In Palmer's Company Precedents, Vol. 2, Edn. 13, at p. 64, the learned author with reference to S. 267 of the Act of 1908 observes that the position under the old Act of 1862 was clear that an unregistered company could not be wound up under that Act unless there were seven members at least, but not so under the Act of 1908, for the expression "shall include" does not necessarily import "shall mean and include" though it may have that meaning.

There is no reported decision under S. 267 of the Act of 1908, but Mr. Jinnah relies on an unreported case mentioned at p. 48 by Palmer in his Company Precedents, Vol. 2, Edn. 14, Halle Perris Trading Corpn., No. 00463 of 1920, in which Ashbury, J., held that there was no jurisdiction under the Act of 1908 to wind up a foreign company unless it had more than seven members. Palmer then observes that this decision appears to be overruled by the new section, that is S. 337 of the Act of 1929. The facts of this case are not known nor the *ratio decidendi*. Mr. Jinnah also relies on an obiter dictum of Scrutton, L. J. at p. 658 in (1923) 2 K B 630.[2] In that case the principal question was whether a Russian Bank which had a branch in England and was carrying on business in England had ceased to exist by reason of certain decrees and orders passed

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[2] Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse, (1923) 2 K B 630=92 L J K B 1053=129 L T 706=39 T L R 561=68 S J 12.

by the Russian Republic, and it was held that the Russian Bank had ceased to exist. Scrutton, L. J., after dealing with this question, observed (p. 658):

> I think it very doubtful whether the effect of the Russian legislation was not that if at the time of the winding up orders there was a company at all, it was an unregistered company with less than seven shareholders, which the English Court had no jurisdiction to wind up.

The case went to the House of Lords, and on the question of the effect of the Russian legislation to which Scrutton, L. J. refers, it was reversed by the House of Lords in (1925) A C 112.[3] The relevancy of the winding up order in that case is not clear, and I find no trace of any argument relating to the effect of winding up order of the Russian Bank in the arguments of the learned counsel. Mr. Jinnah also relies on foot-note (b) to para. 1463 in Halsbury, Vol. 5, Edn. 2, p. 845. The foot-note is to the following effect:

> Prior to the Act of 1929, the requirement that an unregistered company should consist of at least eight members in order that it could be wound up applied to a foreign company. . . .

I am unable to hold that these authorities are conclusive of the question I have to determine. On the other hand, there is also the obiter dictum of Swinfen Eady J., in 54 S J 117,[4] where, after pointing out the difference between S. 199 of the Act of 1862 and S. 267 of the Act of 1908, the learned Judge held that under the Act of 1862 the Court had no jurisdiction to wind up a foreign unregistered company not consisting of more than seven members, and then observes as follows:

> In his Lordship's view, as at present advised, there was much to be said for the construction of that Act which the petitioners set up.

Mr. Jinnah also relies on a Rangoon case in 8 Rang 658.[5] In that case it was held that the Court has jurisdiction to wind up a partnership, association or company under S. 271 only if at the date of the petition such partnership, association or company consists of more than seven members. With all respect to the learned Judges who decided that case, I am unable to agree with the decision, and it seems to me, with respect, that the contrary view taken in the lower Court by Cunliffe, J. in 8 Rang 409[6] is more correct. It is difficult to see where the anomaly to which Sir Arthur Page refers comes in. Upon the whole matter I have reached the conclusion that this Court has jurisdiction to wind up an unregistered foreign company irrespective of the number of its members under Ss. 270 and 271. The next question is whether it is expedient to wind up this company here. The principles on this question are quite clear. A Court has jurisdiction to wind up as an unregistered company a foreign company whatever the number of its members, if it has an office and assets within its jurisdiction, and the mere fact that the order for winding up the company has been made by a competent Court of the place of the company's incorporation cannot make any difference to the jurisdiction of this Court. In such a case the order will sometimes be restricted and the sanction of the Court will be required if further proceedings are taken, and the liquidation here will be ancillary to the Court where the company is incorporated. But in spite of its desire to assist the foreign Court, the Court here will not give up the forensic rules which govern the conduct of its own liquidation: See (1893) 3 Ch 385.[7] As this question was raised somewhat half-heartedly in the argument and it was conceded that the affidavits filed were not sufficient to enable me to reach a conclusion, I stood the petition over at the request of counsel so as to enable the parties to present their respective cases. This they have now done.

In my opinion the case made out before me is sufficiently strong to enable me to hold that it is expedient that the order for winding up should go, and this is fairly conceded by Mr. Vakeel on behalf of one of the opposing creditors. But I should like to summarise briefly the position appearing from the affidavits. In the first place there are certain alleged secured creditors whose claims run into several lacs of rupees, and who are in possession of a very large part of the goods and assets of the company as secured creditors. These claims are not admitted by the petitioning creditor, who says that the letters of hypothecation upon which the claims rest are invalid and not binding on the company. Whatever the position may be, the fact is that these letters of hypothecation were executed in Bombay, and the evidence of the whole of these transactions is in Bombay. These claims will have to be investigated, and can only be satisfactorily investigated in Bombay.

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[3] Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse, (1925) A C 112=93 L J K B 1084=132 L T 99.

[4] New York and Continental Line, (1919) 54 S J 117.

[5] V. E. R. M. Chettyar Firm v. J. Hormasji, AIR 1931 Rang 77=131 IC 497=8 Rang 658.

[6] *In the matter of* Companies Act (1913), A I R 1930 Rang 337=127 I C 736=8 Rang 409.

[7] *In re* English, Scottish and Australian Chartered Bank, (1893) 3 Ch 385=62 L J Ch 825=69 L T 268=42 W R 4.

Then the second point is that the company has assets in several parts of this country, and a considerable part of such assets is in several Native States. It appears the Courts in the Native States have made winding up orders as regards the company within their jurisdiction, and it would be convenient for a liquidator appointed here to deal with the position arising as the result of these winding up orders. Then the claim of the opposing creditor would also require investigation. His claim is seriously challenged by the petitioning creditor, according to whom instead of his being a creditor of the company in the sum of Rupees three lacs he is a debtor, and for this purpose petitioning creditor relies upon the evidence contained in the books of the company, of which he has taken inspection for the purposes of this petition. The opposing creditors' case on the other hand is that though it may appear from the books in the position in which they are that he is a debtor, if the books are balanced properly he would be a creditor of the company to a very large extent, and that certain sums to which he is entitled as a creditor are not entered in the books. This would require investigation which seems to me to clearly fall within the jurisdiction of this Court.

Then, again, the claims of the unsecured creditors, as to which the whole of the evidence is here, I think, can more properly be dealt with by this Court, and I see no reason why these hundreds of small creditors, if a further investigation of their claims is necessary, should be driven to a Court thousands of miles away from here. Then there are suits to which the company is a party pending in India, and the question as to whether these suits should be stayed or not can only be answered by this Court. I do not wish to go into the various other points made in the affidavits in view of the fair attitude taken by the learned counsel on behalf of the opposing creditor, and I am satisfied that it is expedient and in the interests of all parties concerned that the winding up order should go. The question then remains as to the exact form in which the order should be made. As I have stated, the winding up here must be to a great extent ancillary to the work of liquidation which is carried on by virtue of the order made by the English Court. Mr. Desai on behalf of the petitioning creditor has referred to a case in (1886) 33 Ch D 174[8] which deals with this question, and following that precedent, I think the order in this case must be to some extent of the same character. The winding up order will, therefore, be made on the petition presented on 6th February 1935, and I appoint Official Liquidator liquidator of this company and direct him not to act without the special directions of the Judge in Chambers except for the purpose of getting in Indian assets and settling the list of creditors in India, and advertising the order and the appointment of the Official Liquidator once in the Bombay Government Gazette, the "Times of India" and the "Bombay Samachar." The liquidator to open a separate account herein with the Imperial Bank of India, Ltd. As to what other directions should be given must depend upon the course of liquidation which the Official Liquidator under the English winding up order would take in future. The petitioner and the opposing creditor would be entitled to taxed costs to come out of the assets. Taxed costs shall include instruction charges.

P.R./R.K. *Order accordingly.*

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[8] *In re* Commercial Bank of South Australia, (1886) 33 Ch D 174=55 L J Ch 670=55 L T 609.

✻ A. I. R 1937 Bombay 19

N. J. WADIA AND MACKLIN, JJ.

Jagannath Fakirchand — Plaintiff — Appellant.

v.

Shivnarayan Ramlal — Defendant — Respondent.

Appeals Nos. 220 and 218 of 1933, Decided on 23rd March 1936, from decision of First Class, Sub-Judge, Poona, in Darkhast No. 1842 of 1932.

✻ Execution — Decree binding — Transferred decree for execution — Executing Court cannot question jurisdiction of Court passing decree : *33 Bom L R 463=A I R 1931 Bom 295=132 I C 434, Overruled.*

A Court to which a decree has been transferred for execution must take the decree as it stands, and is not entitled to question the validity of the

decree upon the ground that the decreeing Court had no jurisdiction, territorial, personal or pecuniary, to pass it : *33 Bom L R 463=A I R 1931 Bom 295=132 I C 434*, **Overruled**.; *A I R 1914 Bom 27* ; *A I R 1920 Mad 1019* (*F B*) ; *A I R 1932 Lah 289*; *A I R 1931 Pat 27* and *A I R 1931 Rang 252* (*F B*), *Foll.* ; *A I R 1916 Mad 656* and *A I R 1925 Cal 907* (*F B*), *Dissent.* [P 22 C 2]

Y. V. Dixit—for Appellant.

S. S. Kavalekar—for Respondent.

N. J. Wadia, J. — These are cross-appeals arising out of an order made by the First Class Subordinate Judge of Poona, in Darkhast No. 1842 of 1932. Appeal No. 218 has been filed by the judgment-debtor and Appeal No. 220 by the decree-holder.

A dispute with regard to some dealings between the plaintiff and the defendant was referred to arbitration. An award was made by which the defendant was to pay Rs. 23,000 and interest by instalments. There was a default clause under which, besides the personal liability of the defendant, a charge was laid on some immoveable property of his in the Baramati taluka of the Poona District. The award was filed in the Ahmednagar Court and a decree was passed by that Court. There was a default in payment and the plaintiff got the decree transferred for execution to the Poona Court and filed an application for execution in that Court asking for the recovery of the money by attachment and sale of the property in the Poona District on which a charge had been laid under the decree. The defendant judgment-debtor contended in the execution proceedings that the property on which the charge had been laid being in the Poona Court and outside the jurisdiction of the Ahmednagar Court, that Court had no jurisdiction to make the decree. The learned Subordinate Judge held that he as the executing Court had no power to go into the question of the jurisdiction of the Court which had passed the decree, and on this ground he directed that the darkhast should proceed. He stated that if it had been necessary for him to decide the question whether the Ahmednagar Court had jurisdiction to pass the decree, he would have held that that Court had no jurisdiction to impose a charge on the immoveable property in the Poona District. The only question which arises in these appeals is whether a Court to which a decree has been transferred for execution under O. 21, R. 7, Civil P. C., can go behind the decree and question the jurisdiction of the Court which passed the decree.

There has been some conflict of authority on this question. O. 21, R. 7, appears to suggest that an executing Court has no such power, and this inference is strengthened by a reference to the corresponding provision prior to the amendment of the Civil Procedure Code in 1908. S. 225 of the Code of 1882 contained the words "or of the jurisdiction of the Court which passed it" after the words "or of the copies thereof." These words were omitted in the amended Code of 1908, and the clear effect of the omission would appear to be that the legislature intended that the executing Court should have no power to question the jurisdiction of the Court which had passed the decree under execution. Even after the amendment, however, conflicting views have been taken by the different High Courts with regard to the interpretation of the rule. In 38 Mad 682[1] it was held that a decree passed after the death of the defendant and before his legal representative was brought on the record is a nullity, and that an objection on that ground could be taken in the execution proceedings. This was a decision of a single Judge. The judgment is a very short one and does not discuss at any length the authorities on the point nor does it discuss the effect of the amendment made in the Code of 1908. As I shall show later, this decision was referred to in the course of the arguments in a subsequent Madras case, in 43 Mad 675,[2] in which a Full Bench of the Madras High Court took the contrary view.

The ruling principally relied on in support of the view that the executing Court is entitled to go into the question of the jurisdiction of the Court which passed the decree is the Full Bench decision in 53 Cal 166.[3] Walmsley, J., in giving the judgment of the Court, emphasised the distinction between a case in which the Court had no jurisdiction to pass the decree and one in which the Court, having jurisdiction, had exercised it erroneously. It was held that the correct view, and the view for which

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1. Subramania Aiyar v. Vaithinatha Aiyar, A I R 1916 Mad 656=31 I C 198=38 Mad 682.
2. Zamindar of Ettiyapuram v. Chidambaram Chetty, A I R 1920 Mad 1019=58 I C 871=39 M L J 203=43 Mad 675 (F B).
3. Gora Chand Haldar v. Prafulla Kumar Roy, A I R 1925 Cal 907=89 I C 685=29 C W N 948=53 Cal 166=42 C L J 1 (F B).

there was a strong current of authority, was that where the decree presented for execution was made by a Court which apparently had not the jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court was entitled to refuse to execute it on the ground that it was made without jurisdiction. No authorities were cited nor was the effect of the amendment made in 1908 in O. 21, R. 7 of the Code, considered. The correctness of this decision and the difficulty created by the use of the word "apparent" have been pointed out in the Full Bench decision of the Rangoon High Court in 9 Rang 480,[4] to which I shall refer later. This decision has also been doubted in a subsequent case of the Calcutta High Court decided by a single Judge in 60 Cal 191.[5]

The only decision of this High Court cited in support of this view is the decision of Madgavkar, J. in 33 Bom L R 463.[6] It was held in that case that an executing Court cannot question the decree sought to be executed except on the score of patent want of jurisdiction. The decision in 53 Cal 166[3] was relied on in support of this view. The case was not under O. 21, R. 7, Civil P. C. The decision was that of a single Judge and the previous decision of this Court in 38 Bom 194[7] was not referred to at all. As has been pointed out by the learned trial Judge in his judgment, the actual decision in that case was that the decree, the execution of which was opposed on the ground of want of jurisdiction, was executable, and it was only incidentally in stating the general rule that the exception to it on the score of patent want of jurisdiction was referred to.

These are the only three decisions to which we have been referred in support of the contention that the executing Court has the power to go into the question whether the Court which passed the decree had jurisdiction to do so. On the other hand, there is a long series of decisions in support of the opposite view. Even before the amendment of 1908 this Court had, in 7 Bom 481,[8] taken the view that the Court to which a decree had been sent for execution could not go into the question of the jurisdiction of the Court which had passed the decree. West, J. remarked in the course of his judgment (p. 483):

> The intention of the Civil Procedure Code, as shown by Ss. 239 and 242, is manifestly that a Court to which a decree is sent for execution by another under the same Government, and the same law of procedure, shall not take on itself the trial of whether the Court which passed the decree had jurisdiction to make it or not. In case of doubt, the Court where execution is sought may adjourn the execution in order to enable the party interested to make an application to the Court passing the decree. Thence the applicant may of course proceed by appeal, if dissatisfied, in the ascending scale of Courts until he reaches the highest of the province in which the decree was made. It is intended that the decree of this Court, or of the lower Court at which proceedings in the suit have ceased, shall be conclusive. A contrary rule would virtually subject the decrees of the civil Courts to revision and reversal by superior Courts (or even equal or inferior ones) to which they are not subordinate. When the time allowed for an application, if any, has elapsed, the Court to which the decree has been sent, must accept it as a valid one without going into further inquiries, or overruling the judgment of the Court which tried the case.

There are, however, decisions of this Court and of other High Courts in which a different interpretation had been put on S. 225 of the Code of 1882. The amendment made in 1908, in my opinion, made it clear that the executing Court had no power to question the jurisdiction of the Court which passed the decree. In 38 Bom 194[7] it was held by a Division Bench of this Court that under O. 21, R. 7, Civil P. C. (Act 5 of 1908), the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution. In the course of his judgment, Scott, C. J. said (p. 198):

> There are cases which were decided under the Code of 1882 in which the opinion was expressed that it is open for an executing Court to consider whether the decree sent to it for execution was passed by a Court having jurisdiction to pass it. The dictum to that effect in the Bombay Reports is to be found in 15 Bom 216[9] and it was accepted in 17 All 478.[10] The ratio of the dictum in 15 Bom 216[9] was that the Code recognizes in S. 225 the right of the executing Court to inquire into the jurisdiction of the Court which passed the decree. That section, however, has been altered in the Code of 1908, for the words: "or of the jurisdiction of the Court which passed it,"

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[4] S. A. Nathan v. S. R. Samson, A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

[5] Kalicharan Singha v. Bibhutibhushan Singha, A I R 1933 Cal 85=142 I C 60=60 Cal 191=36 C W N 1120=57 C L J 390.

[6] Bajirao v. Sakharam, A I R 1931 Bom 295=132 I C 434=33 Bom L R 463.

[7] Hari Govind v. Narsingrao Nouherrao, A I R 1914 Bom 27=23 I C 123=38 Bom 194=16 Bom L R 30.

[8] Chogalal v. Trueman, (1883) 7 Bom 481.

[9] Haji Musa Haji Ahmed v. Purmanand Nursey, (1890) 15 Bom 216.

[10] Imdad Ali v. Jagan Lal, (1895) 17 All 478=1895 A W N 109.

> have been omitted in O. 21, R. 7, and we think that the inference is clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution.

There has been a series of decisions of other High Courts in which the same view has been taken. In 43 Mad 675[2] a Full Bench of the Madras High Court agreed with the view taken in 38 Bom 194.[7] In that case three questions were referred to the Full Bench : (1) whether S. 21, Civil P. C. governs cases of want of territorial jurisdiction ? (2) Whether S. 21, is applicable to execution proceedings ? and (3) Whether a party who does not raise objection to jurisdiction when a decree is made absolute is not entitled to plead in execution that the order was passed without jurisdiction ? In that case the Judges who made the reference had said that there was no doubt that the final decree in respect of which the application for execution had been made was passed without jurisdiction. Wallis, C. J., after answering the first two questions referred to the Full Bench, said (p. 687) :

> Assuming, however, that S. 21 does not apply, I am still of opinion that the present decree cannot be questioned in execution. An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the 'execution, discharge or satisfaction of the decree' which are required by S. 47 to be dealt with in execution. The provision in S. 225 of the old Code, that a Court might proceed to execute decrees transferred to it without requiring further proof, among other things, of the jurisdiction of the Court which passed the decree, lent some colour to the view that it was open to a Court to which a decree had been sent for execution to go into the question whether the Court which passed the decree had jurisdiction to do so and influenced the decisions which are referred to in the order of reference. These words, however, have been omitted advisedly in the corresponding O. 21, R. 7 of the new Code. Without referring to the statement of objects and reasons, which is not permissible, 47 I A 33,[11] we may, I think, infer that these words were omitted in the new Code because it was felt that it was not for the executing Court to go into questions of the jurisdiction of the Court which passed the decree, at any rate when, as in the present case, that Court was an ordinary Court in British India governed by the Code.

It is to be noted that in this case it had been found that the Court passing the decree had no territorial jurisdiction at the time it passed the decree. This would therefore be a case of a patent or apparent want of jurisdiction. The contrary view which had been taken in the earlier Madras case, 38 Mad 682,[1] had been referred to in the arguments of the learned counsel though not in the judgment. The same view was taken in 13 Lah 25.[12] That again was a case of want of jurisdiction on the part of the Court passing the decree which was apparent on the face of the record. A Subordinate Judge of the Fourth Class, whose pecuniary jurisdiction was limited to Rs. 1,000, had passed a compromise decree for pre-emption on payment of Rs. 1,100. In execution an objection was raised that the decree was a nullity as it had been passed by a Court without jurisdiction. It was held that the words "or of the jurisdiction of the Court which passed it" which existed in S. 225, Civil P. C., having been omitted in O. 21, R. 7, of the new Code of 1908, the executing Court had no power to question the validity of the decree on the ground of want of jurisdiction of the Court which passed it. The decisions in 38 Bom 194[7] and 43 Mad 675[2] were referred to and followed. In 9 Pat 829,[13] the same question was considered and the view taken in 38 Bom 194[7] was quoted with approval and followed. The question was again very fully considered in 9 Rang 480[4] by a Full Bench of the Rangoon High Court in which all the authorities, including 53 Cal 166,[3] were considered and the same conclusion was arrived at as in 38 Bom 194.[7]

It was held that a subsisting decree passed by a duly constituted Court that has not been set aside in proceedings by way of appeal, revision, review or otherwise by due process of law, is not to be treated as a mere nullity but is binding and conclusive against the parties thereto duly impleaded in the suit. A Court to which such a decree has been transferred for execution must take the decree as it stands, and is not entitled to question the validity of the decree upon the ground that the decretal Court had no jurisdiction, territorial, personal, or pecuniary, to pass it. In the course of the judgment, the decision of the Full Bench of the Calcutta High Court in 53 Cal 166[3] was discussed and its correctness doubted. The correctness of this latter decision has also been doubted in a later case of that Court, 60 Cal 191.[5] In my opinion the language of O. 21, R. 7, and the deliberate omission of the words "or of the jurisdiction of the Court which passed it" when the Code was amended in 1908, make it clear that it was not the intention of the Legislature that the Court to which a decree has been sent for execution should have power to inquire into the question of the jurisdiction of the Court which passed the decree, and there is a long series of decisions both of this Court and of other High Courts in support of this view. The contrary view which has been taken in 38 Mad 682[1] and 53 Cal 166[3] has been dissented from in subsequent decisions of those Courts and can no longer be considered as good law.

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[11] Krishna Ayyangar v. Nallaperumal Pillai, A I R 1920 P C 56=56 I C 163=47 I A 33=43 Mad 550 (P C).

[12] Ghulam Mohammad v. Mst. Fazal Nishan, A I R 1932 Lah 289=133 I C 276=13 Lah 25=33 P L R 309.

[13] Syed Ekram Hussain v. Mt. Umatul Rasul, A I R 1931 Pat 27=129 I C 138==9 Pat 829.

The learned Subordinate Judge was therefore correct in the view which he took that the defendant judgment-debtor could not in execution raise the question of the jurisdiction of the Ahmednagar Court. Appeal No. 218 of 1933 must, therefore, be dismissed with costs. Appeal No. 220 of 1933 has been filed by the decree-holder. That appeal is directed against the finding of the learned First Class Subordinate Judge on the first issue whether the Ahmednagar Court which passed the decree had no jurisdiction to pass it. That finding, however, was only given in case the finding on the second issue was not upheld. It was a mere opinion and it was not necessary for the decree-holder to appeal against it. That appeal also will, therefore, be dismissed with costs.

Macklin, J.—The only question for consideration in these cross-appeals is the extent to which the executing Court may go behind the decree. It has ordinarily been an accepted principle that an executing Court cannot do so; but in the present case reliance has been placed primarily upon a remark by Madgavkar, J. occurring in 33 Bom L R 463,[6] to the effect that the general rule is that an executing Court cannot question the decree "except on the score of patent want of jurisdiction." In this matter the jurisdiction of the trial Court was called in question during the execution proceedings; but the executing Court held that it could not consider the objection, though in its opinion the trial Court had no jurisdiction.

So far as this High Court is concerned there is no reported decision which justifies the observations of Madgavkar, J. just quoted; and though the learned Judge himself does not refer to them, 38 Bom 194,[7] 7 Bom 481[8] and 10 Bom 65,[14] are all authorities to the contrary. In general it can be argued that the amendment of the old S. 225, Civil P. C., by the present O. 21, R. 7 which omits the words "or of the jurisdiction of the Court which passed it," is almost conclusive of the intention of the Legislature to make it impossible for an executing Court to question the jurisdiction of the trial Court for any reason whatever. Moreover, as has been pointed out more than once, to permit an executing Court to question the jurisdiction of a trial Court is tantamount to giving the executing Court powers of appeal or of superintendence over the trial Court which in certain cases may well mean the exercise of superintendence over a superior Court by an inferior Court. There is, however, some authority to be found for the contrary view in the decision given in 53 Cal 166,[3] 38 Mad 682[1] and 4 Pat L J 240.[15] In the last two cases no reasons are given. In the first of those cases, though it was a decision of the Full Bench, only one Judge has given reasons and the four other Judges agreed without giving reasons; and the learned Judge who delivered the judgment of the Court merely said (p. 173):

> It would be tedious to examine the numerous decisions in detail, and it would not lead to any useful result. I think it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

This decision, though it is a decision of the Full Bench, was strongly dissented from in 60 Cal 191.[5] This was a decision of a single Judge; but full reasons were given in the judgment, and moreover it was based upon the Full Bench case in 9 Rang 480,[4] in which the same case of the Calcutta High Court was dissented from and the Bombay case in 10 Bom 65,[14] approved. In the circumstances I do not think it necessary for me to refer to any other authorities. I hold that we are bound by the authority of the previous decisions of

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[14] Kasturshet Javershet v. Rama Kanhoji, (1885) 10 Bom 65.

[15] Jungli Lall v. Laddu Ram Marwari, A I R 1919 Pat 430=50 I C 529=4 Pat L J 240 (F B).

Benches of this High Court and that both the appeals must be dismissed.

B.D./R.K. *Appeals dismissed.*

A. I. R. 1937 Bombay 24

DIVATIA, J.

Shamrao Krishnaji Honnali and *others* —Defendants—Appellants.

v.

United House Building and Engineering Society (India), Bangalore— Plaintiff —Respondent.

Second Appeal No. 259 of 1934, Decided on 23rd August 1935, from decision of Dist. Judge, Dharwar, in Appeal No. 293 of 1932.

Companies Act (1913), S. 277 — Scope — Company registered in foreign state, not complying with provision of S. 277 — Default merely imposes penalty but does not debar defaulting company from filing suits in British India.

A company which is registered in a foreign State is entitled to file suits and maintain actions in British India and the mere fact that it has not complied with the requirements of S. 277, does not disable it from filing suits and maintaining actions in British India. S. 277 merely imposes a penalty for not complying with its provisions. A company in a foreign State does not cease to be a legal body merely because it does not comply with the requirements of S. 277. [P 24 C 2]

G. P. Murdeshwar—for Appellants.

Ramnath Shivlal and *C. M. Trivedi*—for Respondent.

Judgment.—All these appeals have been preferred by the defendants in suits brought by a company called the United House Building and Engineering Society (India) Ltd., of Bangalore, which had its headquarters in the Mysore State, and as such it is a foreign company. That company filed suits against the defendants to recover certain amounts for the work done by that company for them. The principal defence of the defendants was that this company had no right to file suits in British India, inasmuch as it was not a legal body, because it has not complied with the requirements of S. 277, Companies Act. That section says that every company incorporated outside British India, which at the commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India, shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the Registrar a certified copy of the charter, statutes or memorandum and articles of the company, etc., and the full address of the registered or principal office of the company, etc., etc. It is further laid down in this section that if a company fails to comply with any of the requirements of this section, it shall be liable to a fine not exceeding Rs. 500 or, in the case of a continuing offence, Rs. 50 for every day during which the default continues.

It is urged for the defendants that as the requirements of this section were not complied with by the company, it was liable to a prosecution, and that although the section does not speak specifically of a company being disabled from maintaining any action, still that is the meaning of that section, because when it makes a default in complying with the requirements of this section, then it ceases to be a legal body, and it cannot be permitted to sue in British India. Now, it is admitted, and I think it must be admitted, that a company which is registered in a foreign State is entitled to file suits and maintain actions in British India, and it is not required that a company must register itself in British India if it wants to carry on some business there. It is no doubt required in S. 277 that its charter and other papers should be filed before the Registrar, but the only penalty that is sanctioned by the Legislature for not complying with the requirements of this section, is only a fine which may extend to Rs. 500, or a continuing fine of Rs. 50 per day, as long as the requirements are not fulfilled. But the section nowhere says that if it does not comply with its requirements it ceases to be a legal body in British India, with the result that it loses its right of maintaining any action in British India. To my mind, that would be reading into this section something which is not there. It may be a good ground for the legislature to impose the penalty of not being able to file a suit if its requirements are not fulfilled. But in the absence of any such specific provision in this section or elsewhere in the Companies Act, I do not think the defendants are right in going to the length that it loses its right of maintaining any action. Therefore, I think the lower appellate Court was right in holding that the default made by the company in fulfilling the requirements of S. 277 does not disable it from maintaining the present action.

I do not agree with the reasoning of the trial Court which applied the analogy of a suit based on a promissory note or a prosecution under the Abkari Act. These analogies would not apply to the present case, because here it is clear that ordinarily a company regularly established in a foreign State would be entitled to file a suit in British India. The default that is committed under the section is penalized by a fine and nothing more, and the result therefore is that the company can maintain this action. That being so, it is not necessary to go into the other question that has been dealt with by the lower Court and also argued here, namely, that this company had an established place of business in British India, and that therefore it came within the scope of S. 277. Even assuming that it had an established place of business in British India, and therefore, it came within the scope of S. 277, I think the section does not apply so far as a suit is concerned, and it does not disable the company from maintaining the present suits. The appeals are therefore dismissed with costs.

R.M./R.K. *Appeals dismissed.*

A. I. R. 1937 Bombay 25

BEAUMONT, C. J.

Ratan Jayakisan Shukla—Applicant.

v.

Bapu Hiraji Kunbi—Opponent.

Civil Revn. No. 217 of 1935, Decided on 24th July 1936, against order of Dist. Judge, East Khandesh, Jalgaon, in Appeal No. 139 of 1934.

(a) Bombay Civil Courts Act (14 of 1869), S. 40—Clerk of Court can, under S. 40, accept plaint presented outside office hours and outside office buildings—O. 4, R. 1, Civil P. C., does not prohibit such presentation—Clerk merely receiving plaint and subsequently accepting it after referring matter to Judge—He cannot be said to have accepted it.

The clerk of the Court, who is a duly constituted officer of the Court with power to accept a plaint under the Bombay Civil Courts Act, can under S. 40 of the Act, accept a plaint outside office hours and outside the Court buildings although he is not bound to do so. There is nothing in O. 4, R. 1 to suggest that the plaint must be presented during Court hours or within precincts of the Court. [P 25 C 2, P 26 C 1]

Where however the clerk merely receives the plaint when presented and accepts it after referring the matter to the Judge, he cannot be said to have accepted it when presented: *34 All 482 (F B)* and *A I R 1924 Mad 448, Rel. on.* **[P 26 C 1]**

(b) Revision—Question of fact—Whether or not plaint has been accepted by clerk of Court is question of fact.

Whether or not a plaint has been accepted by the clerk of Court is a question of fact, which cannot be dealt with in revision. [P 26 C 1]

W. B. Pradhan and *M. W. Pradhan*—for Applicant.

Y. V. Dixit—for Opponent.

Order.—This is an application in revision under S. 115, Civil P. C., against an order made by the District Judge of East Khandesh, and it raises a short, but not unimportant, point. The plaintiff was suing on a bond, and the last day for filing the suit so as to bring it within the period of limitation was 28th February 1933. At 11 p. m. on that day the plaintiff presented his plaint to the clerk of the Subordinate Judge's Court, in which the plaint was to be filed, at the clerk's private house. Both the trial Court and the lower appellate Court assumed that the clerk purported to accept the plaint so presented, but they held, on that assumption that the plaint was not properly presented, and that the clerk had no power to accept it. If I were prepared to accept the fact that the plaint was accepted by the clerk, I should disagree with the judgments of the lower Courts and hold that the plaint was presented in time. O. 4, R. 1, provides that:

> Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

There is nothing to suggest that the plaint must be presented during Court hours, or within the precincts of the Court. S. 40, Bombay Civil Courts Act, provides for the appointment of a clerk of a civil Court, and directs that in addition to such duties as may from time to time be prescribed by the High Court, he may receive and register plaints, and shall refer such as he may consider should be refused for the orders of the Judge of the Court. So that under that section the clerk can receive plaints. If he thinks that a plaint ought not to be received, he must refer the matter to the Judge. But I apprehend that if he is doubtful whether a plaint should be received or not, it is open to him to refuse to receive it, and refer the matter to the Judge. It has been held both in Allahabad and in Madras, 34 All 482[1] and 47 Mad 312,[2] that the Judge can accept a plaint at any hour he chooses, though outside office hours, and at any place he chooses, and I see myself no reason to doubt that the clerk of the Court who is a duly constituted officer of the Court with power to accept a plaint under the Bombay Civil Courts Act, can accept that plaint outside office hours and outside the Court buildings, although I do not for a moment suggest that the clerk is bound to accept a plaint out of Court hours. But I am not at all satisfied in this case that in fact the clerk ever did accept the plaint. It was presented to him, as I have said, at **11** p. m. on the 28th, and there is an endorsement upon it, "Received on 28th February 1933, at 11 p. m. vide order dated 1st March 1933." It is clear therefore that that endorsement cannot have been made until after the order of 1st March 1933 had been made, so that the endorsement must have been made some time after, a day at least after, the presentation of the plaint. It appears from the learned Subordinate Judge's order made on 1st March 1933, that the plaint was presented to the clerk at 11 p. m. on the last day of limitation, and that the ratification by the Judge of such presentation was sought on 1st March. The Judge doubted whether he could ratify what he calls the presentation to the clerk after the period of limitation had expired, but he directed that the plaint should be accepted subject to any objection that might be taken at the hearing. It seems to me clear from that order of the learned Judge that the clerk had not himself accepted the plaint. He only accepted it after the Judge approved; in other words he really referred the matter to the Judge, and the Judge could not accept the plaint on the day after limitation had expired. If the clerk had accepted the plaint, no ratification by the Judge was required. Whether or not the plaint was accepted by the clerk is a question of fact with which I cannot deal in revision, and before altering the orders of the lower Court, I should have to refer back the question of fact. But as I am satisfied on the documents that the only proper answer to such a question would be that the plaint was not accepted on 28th February 1933, and as it would follow from such a finding that the orders of the lower Courts are right, it is undesirable to make any reference on the question of fact. I think therefore that the orders of the lower Courts are right, though not for the reasons which the learned Judges gave. That being so, the application must be dismissed with costs.

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[1] Thakur Din Ram v. Hari Das, (1912) 34 All 482=14 I C 744=9 A L J 743 (F B).

[2] Sattayya Padayachi v. Soundarathachi, A I R 1924 Mad 448=79 I C 1017=47 Mad 312=46 M L J 78 (F B).

R.M./R.K. *Application dismissed.*

A. I. R. 1937 Bombay 26

B. J. WADIA, J.

Cooverji Umersey—Plaintiff.

v.

Mawji Vaghji and *another*—Defendants.

O. C. J. Suit No. 171 of 1927, Decided on 13th February 1936.

Contract—Pawn—Notice of sale by pawnee—Notice must refer to debts for which goods are pawned—Want of proper notice—Sale does not become void—Remedy of pawnor is damages for conversion—Measure of damages is loss to pawnor.

A pawnee has a right to sell the pledged goods; that right is perfected with the giving of the notice of sale and it is open to the pawnee to sell at any date thereafter. The power of sale is expressly conferred upon him for his benefit according to his discretion; and for the realisation of the debt due to him, he is not bound to give full details about the date, and the time and place of sale. It must, however, be a reasonable notice, reasonable, presumably having regard to the circumstances of each case, and it must refer to the debt for which the goods were pledged and for recovering which the pledged goods are to be sold. The sale of pledged goods without a proper notice does not render the sale void but by analogy to S. 69 (3), T. P. Act, the remedy of the pawnor for an improper sale of the mortgaged property is damages for conversion to the pawnor. The correct measure of damages is the loss which the pawnor has actually sustained, taking into account the pawnee's interest in the goods at the time of the conversion: *A I R 1918 All 363* and *Johnson* v. *Stear*, *(1863) 15 C B (N S) 330*, *Ref.* [P 27 C 1, 2]

J. H. Vakeel and *Jamshed Kanga*—for Plaintiff.

M. P. Amin and *M. C. Chagla*—for Defendant 2.

B. J. Wadia, J.—(The judgment, after dealing with points not necessary for purposes of reporting, proceeded.) It is contended that no proper notice of the sale was given by the pawnee to the pawnor under S. 176, Contract Act. It must be remembered that the 922 bales were hypothecated to Cooverji Umersey & Co. on 30th September 1925, by defendant 1's firm of Damodar Mawji Vaghji. On 13th January 1927, Cooverji Umersey & Co. wrote to Damodar Mawji Vaghji that they did not want to keep their moneys invested on the security of the bales, that Damodar Mawji Vaghji should give an order within four days for sale or pay Rs. 60,000, and in default they would ask their Kobe agent to sell off the goods. This letter was received by Damodar Mawji Vaghji on the 17th January. On that date Cooverji Umersey & Co. gave notice through their solicitors to defendants 1 and 2, demanding Rs. 1,20,000 with the interest due thereon, and in default of payment they threatened to realise their mortgage security.

On the same date Cooverji Umersey & Co. wrote through their attorneys that their security for the loan was the equitable mortgage, and the bales were given merely as further security. On the 20th January defendants 1 and 2 through their solicitors replied that the bales were primarily security for repayment of the loan, and that the equitable mortgage was given only by way of further security, that the firm was amply secured and there was no need to sell the bales. The question is whether the notice of the 13th January is a proper notice for the sale of the goods pledged to secure repayment of the loan of Rs. 1,20,000. It was argued that no notice was given to defendant 2. But strictly speaking no notice to her was necessary as she was not the pawnor of those goods. The 'moneys' referred to in the notice however are not the Rs. 1,20,000, but the moneys due under the joint ventures account, and that is made clear from para. 4 of the firm's reply to the counter-claim. A pawnee has a right to sell the pledged goods; that right is perfected with the giving of the notice of sale, and it is open to the pawnee to sell at any date thereafter. The power of sale is expressly conferred upon him for his benefit according to his discretion and for the realization of the debt due to him. It has also been held that he is not bound to give full details about the date, time and the place of sale: see 40 All 522.[1] It must however be a reasonable notice, reasonable, presumably having regard to the circumstances of each case, and it must refer to the debt for which the goods were pledged and for recovering which the pledged goods are to be sold. It was argued that the four days' notice was not sufficient when the goods were lying at Kobe, but apart from that, though in fact the goods were not sold within four days, there was no demand of the debt of Rupees 1,20,000 for which the pledged goods were to be sold, and the notice was based on the assumption that the bales were security only or primarily for the amount due under the joint ventures account. In my opinion therefore the notice is not a proper notice as contemplated by S. 176.

The result is that the pawnee having sold before he was entitled to sell, the sale is wrongful, and the pawnor's remedy is to sue the pawnee for having converted the pawnor's goods to his own use. It has however been held that the wrongful act of the pawnee does not annihilate the contract between the parties:see 15 C B (N S) 330.[2] In that case there was a sale of the pledged goods, but it was wrongful because the sale was premature. The pawnee becomes liable in damages for conversion to the pawnor, but I do not think that the sale is thereby avoided and must be set aside. It is not so provided by S. 176, Contract Act. Under S. 69 (3), T. P. Act, the remedy of a mortgagor for an improper sale of the mortgaged property is in damages. The statute protects the innocent purchaser and confines the remedy of the mortgagor to a suit for damages. I think that by analogy the same result should follow when there is an improper sale by a pawnee of the goods pledged to him. The important question which still remains is, what is the measure of the damages to the pawnor? It is laid down in Halsbury, Vol. 22, p. 243, Art. 503, that the correct measure is the loss which the pawnor has actually sustained, taking into account the pawnee's interest in the goods at the time of the conversion. What is the loss sustained by the pawnor here? There must be evidence of that loss, for the Court has to determine what amount should be credited to defendants 1 and 2 in respect of the 546 bales.

It was argued on behalf of defendant 2 that the proper measure of damages was the difference between the sale price of the goods and the market rates prevailing on the date of sale. If so, it was for defendant 2 to have led evidence to show how the sale has prejudicially affected her. The firm have put in the account-sales which they received later, and of which inspection was given to defendants 1 and 2. It has been held in 6 Bom H C O C 39[3] that account-sales are prima facie evidence of the amount realized by the sale of the goods in foreign markets, unless some foundation is laid for stating that the account-sales are incorrect; a mere objection that they are not correct is not enough. This case was followed in 16 Mad 238[4] and 28 Cal 209.[5] Defendants 1 and 2 have annexed certain particulars of damage to the written statement, but the figures are obviously incorrect when compared with the rates given in the account-sales. The only witness whom they called was Rashid Fatehali. He gave no evidence of sales or purchases of similar goods in Japan at the date of sale, but deposed to two offers made by his firm in respect of Chalisgaon cotton which is Khandesh cotton. It has been pointed out in 10 Bom L R 907[6] that too much importance ought not to be attached to offers, for "an offer does not come within the category of sales and purchases," and amounts merely to an expression of opinion on the part of the offerer. The offers made by Rashid are not conclusive as to the rates, though I accept the statement that an offer, provided it is bona fide, is prima facie evidence of the fact that there is a buyer of these goods at that rate at the time. There is also another method of calculating damages, namely, by taking the Bombay prices of similar goods and adding to them the cost of shipping charges to Japan, freight, insurance, etc.; but whether such a method is always satisfactory it is difficult to say. The sale must however be considered wrongful for want of proper notice.

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[1] Kunj Behari Lal v. Bhargava Commercial Bank, Jubbulpore, A I R 1918 All 363=45 I C 462=40 All 522=16 A L J 390.

[2] Johnson v. Stear, (1863) 15 C B (N S) 330=33 L J C P 130=10 Jour (N S) 99=12 W R 347 =9 L T 538.

I am not prepared to say that this is a case merely for nominal damages, as there is some evidence of an intention to redeem before the goods were actually sold and the difference between the prices realized and the alleged market prices is not small. There has been considerable delay in the realization of the plaintiff's claim, but I think that I should, though reluctantly, give defendant 2 one more opportunity to prove the actual damage sustained by her. There will therefore be a reference to the Commissioner to ascertain the damages sustained by defendant 2 by reason of the sale of the 546 bales on or about 29th January 1927. The Commissioner will first ascertain the amount of the loan and interest thereon at 9 per cent per annum from 30th September 1925, till the date of his report, and tack on to that amount the rents payable up to the date of his report in terms of the order of 23rd July 1935. The sale-proceeds of the 130 bales, together with interest thereon at 9 per cent per annum from the date of their realization till the date of the report, and the price of the 546 bales which, as defendant 2 might prove, should have been realized, with interest thereon similarly calculated, will be set off against the amount due under the loan with the interest and the rents added thereto. I direct the commissioner to expedite the reference, and complete the same within four months from this date, so that his report may be available soon after the Court reopens in June next. If there is any application made on behalf of defendant 2 for the issue of a commission to Japan, the Chamber Judge will no doubt take the delay that has already occurred into consideration before making his order. I order defendant 2 to pay seven-eighths of the plaintiff's costs of this hearing from the date of remand, such costs to be tacked on to the mortgage claim. No order as to the remaining one-eighth of such costs.

B.D./R.K. *Order accordingly.*

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* A. I. R. 1937 Bombay 28

BEAUMONT, C. J. AND WASSOODEW, J.

Dattatraya Malhar Bidkar — Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 44 of 1936, Decided on 13th August 1936, made by Sess. Judge, Nasik.

*** (a) Press and Registration of Books Act (25 of 1867), Ss. 3, 5 and 12 — Mere seller or distributor of paper is not publisher within meaning of Ss. 3 and 5—Only person who can be held guilty of publishing is one who performs act of publishing within Ss. 3 and 5.**

The only person who can be guilty of publishing under S. 12 is the person who is performing the act of a publisher within Ss. 3 and 5. The publisher of a paper referred to in Ss. 3 and 5 is the man who publishes it in the ordinary sense of the term, i.e., arranges with the proprietor for its distribution, and a mere seller or distributor of the paper is not a publisher under either of the Ss. 3 and 5. Where no name of a publisher appears on the document, the Court cannot assume the person who is actually in possession of the document and distributing it, to be the publisher. [P 30 C 1]

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[3] Hodgson v. Rupchand Hazarimal, (1869) 6 Bom H C O C 39.

[4] Mayen v. Alston, (1893) 16 Mad 238.

[5] Barlow v. Chuni Lall Neoghi, (1901) 28 Cal 209.

[6] Govt. of Bombay v. Merwanji Muncherji, (1908) 10 Bom L R 907.

Where, therefore, a person distributes in streets certain printed pamphlets or papers giving notice of certain meeting, he cannot be held guilty of an offence under S. 12 on the ground that the distribution of pamphlets amounts to publication of book or paper within the meaning of S. 12. [P 29 C 1 ; P 30 C 1]

(b) **Interpretation of Statutes—Penal provision—Language of penal provision should be so construed, that no case falls within it which does not fall within reasonable interpretation of enactment.**

In dealing with a penal provision the rule of strict construction requires that the language shall be construed so that no cases shall be held to fall within it which do not fall within the reasonable interpretation of the enactment. [P 30 C 2]

Purshottam Trikam, *T. M. Guido* and *M. N. Oka*—for Accused.

K. McI. Kemp and *B. G. Rao*—for the Crown.

Beaumont, C. J.—This is a reference made by the Sessions Judge of Nasik recommending that this Court should set aside the conviction of a man named Dattatraya Malhar Bidkar, who was convicted under S. 12, Press and Registration of Books Act, Act 25 of 1867, and fined Rs. 5. The learned Sessions Judge thinks that the conviction was not justified in law. What the accused person did was to distribute in the streets printed handbills in the form of Ex. 3, giving notice of two meetings of agriculturists which were to be held in order to support certain resolutions being brought up in the Bombay Legislative Council, and it is suggested, and the learned Magistrate so held, that in so doing he was guilty of an offence under S. 12 of the Act inasmuch as the handbills did not comply with S. 3. Two points arise on the reference, first, whether Ex. 3 is a paper printed within the meaning of that expression in S. 3 of the Act, and, secondly, if it is, whether the action of the accused in distributing this pamphlet or paper amounted to publication, and so constituted an offence under S. 12. With regard to the first point, S. 3 of the Act provides that:

> Every book or paper printed within British India, shall have printed legibly on it the name of the printer and the place of printing, and (if the book or paper be published) the name of the publisher, and the place of publication.

"Paper" is not defined in the Act, though "newspaper" is, and S. 5 of the Act deals expressly with newspapers. The expression "paper printed" is not an accurate expression, because paper as an article is not printed, but manufactured; when it has been manufactured it may have letters, signs or figures printed upon it, but literally speaking the paper itself is not printed. The Advocate-General argues that the only meaning which can be given to the expression "paper printed" is that it includes every piece of paper on which any letter, figure or sign is printed, and that every such piece of paper falls within the mischief aimed at by the Act. The view has been expressed by the Chief Justice of the Patna High Court in A I R 1931 Pat 351,[1] that the word "paper" in S. 3 is practically synonymous with "newspaper." There is much to be said for this view, though, of course, the argument against it is that when the legislature intended to refer to a newspaper it did so in express terms. If the contention of the Advocate-General be correct as to the meaning of "paper," it would seem to follow that offences against S. 3 of Act are committed by practically everybody from the Viceroy and Governors downwards. Every invitation to dinner or to a party of any sort which is printed, every printed notice from a club secretary to members, every printed visiting card would be "paper printed" within the meaning attributed to the expression by the Advocate-General and would require to have printed upon it the name of the printer and place of printing. No doubt S. 21 provides some safeguard in that it enables the Government to exclude certain classes of books or papers from the operation of the Act, but I should certainly feel great hesitation in giving to the words used in S. 3 the wide meaning attributed to them in the argument of the Advocate-General. However, in my opinion, it is not necessary to decide in this case what the exact meaning of the expression "paper printed" may be, because it is, in my opinion, perfectly plain that the accused has not published this paper, if it be a paper, within the meaning of S. 12. S. 12 provides that "whoever shall print or publish any book or paper otherwise than in conformity with the rule contained in S. 3" shall be liable to conviction and punishment. One must read the word "publish" in that section in conjunction with the reference to a "publisher" in S. 3 and in S. 5, which latter section provides that the "publisher" of every newspaper has to make a declaration in the form set out in the section. It is quite clear that the publisher of the paper referred to in S. 3 and S. 5 is the man who publishes it in the ordinary sense of the term, that is to say, arranges with the proprietor for its distribution, and a mere seller or distributor of the paper is not a publisher under either of those sections. In my opinion the only person who can be guilty of publishing under S. 12 is the person who is performing the act of a publisher within S. 3 and S. 5. The Advocate-General argues that if no name of a publisher appears on the document, the Court must assume the person who is actually in possession of the document, and distributing it, to be the publisher. In my opinion no such assumption can be made; in most cases such assumption would be quite contrary to the facts. There is no evidence in this case that the accused published Ex. 2, and on that ground the reference of the learned Judge is correct. The conviction must be set aside and the fine repaid.

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[1] Rameshwar Prashad Verma v. Emperor, A I R 1931 Pat 351=1931 Cr C 799=133 I C 682=32 Cr L J 1063=12 P L T 767=10 Pat 482.

Wassoodew, J.—I should add nothing on my own account to what my Lord the Chief Justice has just said in regard to the alleged offence of the accused but for the fact that the question raised is of some general importance so far as the actual decision is concerned. The accused was convicted under S. 12, Press and Registration of Books Act, Act 25 of 1867, for having published a pamphlet in Marathi purporting to be issued under the signature of the Secretary to the Local Congress Committee inviting certain agriculturists to attend public meetings convened in connexion with certain grievances of theirs. The accused was merely found distributing the pamphlets to the public, and for that act he was held liable as a publisher. S. 12 provides that "whoever shall print or publish any book or paper otherwise than in conformity with the rule contained in S. 3 of this Act" shall be punished by fine, etc. S. 3 requires certain particulars to appear on every book or paper printed in British India. Those particulars do not appear on the pamphlet in question. The gist of the offence is the printing or publishing of any book or paper, and the pertinent questions that arise are whether the accused's act amounts to publishing the pamphlet within the meaning of S. 12, and whether the pamphlet is a paper printed within the meaning of S. 3. The former question is really decisive of the case.

The latter question however involves some difficulty in construing the provisions of S. 3 of the Act. These provisions create a certain amount of ambiguity in view of the language used as to whether the pamphlet in question could be described as paper printed. If regard is had to the material portion of the preamble, it is evident that the object and scope of the regulation is to control printing presses and periodicals containing news. If that preamble serves legitimately as a guide to the purpose and intent of the legislature in enacting Ss. 3 and 12, a paper on which any kind of printed matter might appear other than news is not a paper printed within S. 3. If it was, it would bring within the scope of the penal provisions many kinds of printed matter which have hitherto been allowed to be printed and circulated with impunity. It is however unnecessary to attempt to explain precisely what is meant by the expression "paper printed" in S. 3, because I am clearly of the opinion that a mere distributor or seller of a book or other printed paper is not a publisher within the meaning of S. 3. That word is used in a technical sense meaning a person who has undertaken to print certain matter for public circulation. It is elementary that in dealing with a penal provision the rule of strict construction requires that the language shall be construed so that no cases shall be held to fall within it which do not fall within the reasonable interpretation of the enactment. I think it will be doing considerable violence to the language of Ss. 3 and 12 to adopt the interpretation which the learned Advocate-General has asked us to adopt for upholding the conviction of the accused for merely distributing the pamphlet.

As generally happens, pamphlets of this description are given for distribution to a person hired for the purpose. Although the latter takes part in the circulation of the pamphlet, he cannot be regarded as a publisher in the sense in which that word is understood with reference to the publication of a book or paper, and in which sense it is used in S. 3. The insistence upon the printing of a mere distributor's name on every such pamphlet will lead to results which could not be imputed to the legislature within its intention. That restricted interpretation of the word "publisher" in S. 3 must govern the provisions of S. 12 excluding from its operation mere distributors or sellers of books or pamphlets. It is important to note that in the charge sheet in vernacular there is no suggestion that the accused is the publisher of the pamphlet but a mere distributor, and it is expressly indicated that the person issuing the same is some person connected with the Congress. It is not suggested that the accused is an office-holder in that body, causing the pamphlet to be printed for circulation. Therefore, the conviction is wrong, and the reference must be accepted, and the accused acquitted.

R.M./R.K. *Reference accepted.*

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* A. I. R. 1937 Bombay 31

BEAUMONT, C. J. AND WASSOODEW, J.

Laxman Jairam and *another* — Accused.

v.

Emperor.

Criminal Confirmation Case No. 13 of 1936 and Appeals Nos. 239 and 262 of 1936, Decided on 12th August 1936, from convictions by Sess. Judge, Nasik.

*** Criminal Trial—Confession of co-accused —Difference between confession of co-accused and testimony of accomplice — —Confession can be considered but cannot alone form basis of conviction.**

The confession of a co-accused cannot be dealt with on the same basis as the evidence of an accomplice. The ordinary way of dealing with accomplice's evidence is to treat the evidence of an accomplice as the foundation of the prosecution story, and then to see how far there is any corroboration of matters which affect the accused and tend to show that the evidence is true as against him. But one cannot take the confession of a co-accused as the basis of the prosecution case. The evidence of an accomplice is given on oath, and the witness is subject to cross-examination, and S. 133, Evidence Act, shows that a conviction based on the uncorroborated evidence of an accomplice is not bad in law, although in practice Courts in this country refuse to convict on such evidence. But the confession of a co-accused is not evidence given on oath in the witness box, and there is no right of cross-examination. It is not evidence at all as defined in S. 3, Evidence Act. S. 30 says that the evidence may be taken into consideration but does not say that confession of a co-accused is to be treated as evidence against anyone except the confessing party, and hence the confession is not strictly evidence against a co-accused and a conviction based solely on the confession of a co-accused would be bad in law: *A I R 1919 Bom 164* and *A I R 1914 Bom 305, Partly disapproved.* [P 33 C 1, 2]

D. R. Patwardhan and *L. P. Pendse* —for Accused 2.

B. G. Rao—for the Crown.

Facts.—Laxman (accused 2) lived at Nandgaon and was a butcher by profession. His neighbours were one Nathu Bhoi (deceased) and his wife Soni (accused 1). Criminal intimacy grew up between Laxman and Soni which was resented by Nathu. About November 1935, Nathu admonished Laxman and administered a sound beating to him in consequence of which Laxman vowed vengeance and threatened that he would slaughter Nathu like a goat. To avoid scandal, Nathu left Nandgaon and settled with Soni at the neighbouring village of Sakora. Six weeks later, that is on 25th January 1936, Nathu went to Nandgaon with his nephew Zelia. The latter proceeded further to Manmad, while Nathu remained behind at Nandgaon. Since then Nathu was not heard of. On 31st January, Soni's father received a pseudonymous letter by post from Manmad informing him that Nathu had been killed in a railway accident. Zelia proceeded to Manmad again to test the information, and found that it was not true.

On 7th February 1936, a bhil discovered a corpse floating in a well. It was wrapped up in two gunny bags. The police had it taken out, when it was identified by Soni and Zelia as the body of Nathu. Soni was taken into custody the following day. She made a certain statement to the police, and on the same day, that is 8th February, she produced a cap and shirt belonging to Nathu, which were dug up and concealed in sand near a river bed, and she pointed out a well, which when drained yielded a chopper, which was identified as belonging to Laxman. On 12th February, Soni made a detailed confession before a Magistrate, in which she stated:

> I and my husband were living at Nandgaon. Laxman lived by our side. We used to have frequent talks with each other which resulted in close intimacy. Then my husband came to know of it. The intimacy continued for two years. Two or three months before my husband personally saw our intimacy. This led to scuffle between them. It was then amicably compromised. During that scuffle Laxman said to my husband that he would kill my husband like a goat. After Divali holidays my husband said to me that we would go Sakora and cultivate melons and live there. We accordingly stayed there in a hired house. Nineteen days back we both came to bazar at Nandgaon on a Saturday (25th

January). My husband handed over to me the purchases of bazar at 4 p. m. asking me to go home ahead. So I started. I met Laxman near the cabin, who told me that he would come to my house at night to cut my husband, that I should not disclose it to anybody. He also promised to shield me. He asked me to keep the door open. At first I refused but I gave in at his persistent pressings. My husband returned home at 8 p. m. We then slept after taking our meals. I left the door open. Laxman came at about midnight and awoke me. The lamp was burning. He then said to me that I should not see, that I should keep my face covered. So I covered it with a quilt. Then Laxman cut the neck of my husband instantly. My husband began to make agonising movements. I got up. His neck was cut like a goat's. Laxman then asked me to go out so that he would put him in a sack. So he put my husband in a sack and tied it with a cotton rope of the net. He then asked me for an illicit intercourse. I refused but he held me forcibly and had intercourse with me. Then I lifted the corpse of my husband for Laxman. He said that he would carry the body and throw it in a ditch somewhere. He asked me to throw the knife in a well and bury the clothes in a river bed and that I should not disclose it to anybody. He also promised not to implicate me. Then he carried away the dead body I accompanying him up to the chavdi from where I returned. I then repaired to my house. I did nothing on Sunday. On Monday morning I threw the knife in a well which was situated at a long distance from Sakora village. I buried cap and shirt of my husband in the river bed. I washed bloodstained quilts. Laxman returned on Friday and informed me that the corpse was thrown in a well. He said that he would send a chit to my parents that my husband died being crushed under a railway train. He then immediately went to Nandgaon.

Laxman and Soni were tried together, the former for the offence of murder and the latter for aiding and abetting the murder by conspiracy and presence. At the trial, Soni adhered to her confession. She was convicted mainly on that evidence and sentenced to transportation for life. Laxman pleaded his innocence of the offence charged, and denied his ownership of the chopper, though he admitted illicit intimacy with Soni and the beating administered to him by Nathu on account of the intimacy. The trial Judge used Soni's confession against him, and treated it as corroborated in material particulars by the discovery of the chopper and of the cap and shirt of Nathu. Two of the assessors found Laxman guilty of murder, the other two were for giving him the benefit of doubt. The Judge found Laxman guilty of murder, and sentenced him to the extreme penalty of the law, observing as follows:

Soni's confession has been recorded with due care and caution. Under S. 30, Evidence Act, it can be used against her co-accused Laxman. In it Soni has inculpated herself as an accessory before and after the murder. She implicates Laxman as her husband's murderer in clear and definite terms. There was no necessity for her falsely to implicate her paramour if the facts were otherwise.

There is besides independent evidence in corroboration of the material particulars of the confession. The medical evidence for instance supports that part of the confession relating to the cutting of the throat. The evidence concerning the discovery of the corpse bound in gunny bags, of a blood-stained quilt from the house, cap and shirt from the river bed, chopper from the well and the receipt of the pseudonymous letter bear out the confession in all details. When a person makes a confession and exposes himself to pains and penalties, there is guarantee of its truth. Soni's confession points as strongly to Laxman's guilt as to her own. The chopper with which the crime was committed has been satisfactorily proved to belong to Laxman. It is more properly a butcher's knife. It was made by blacksmith Dagadu (witness No. 9) for Laxman. This witness is able to identify his handiwork by the mark on the blade which he had put at the special request of Laxman. The report of the Imperial Serologist (Ex. 29) shows that the chopper was stained with human blood. This chopper connects accused Laxman fairly conclusively with the murder of Nathu.

Both Soni and Laxman preferred separate appeals to the High Court. The sentence of death passed on Laxman came up before the High Court for confirmation.

Beaumont, C. J.—(His Lordship first dealt with the case of Soni and treating her confession as evidence against her, confirmed the conviction and sentence passed upon her. The judgment next proceeded to deal with the case of Laxman thus.) The case of accused 2 is on a different footing altogether. There is, so far as I can see, practically no corroboration of the story told in the confession of Soni as against Laxman. Two witnesses were called who said that they saw Laxman on the night of 25th January in the neighbourhood of Sakora, but their evidence was not relied on by the Public Prosecutor, and was disbelieved by the learned Sessions Judge. There is no evidence whatever that Laxman wrote this pseudonymous letter. He is, as are all the parties, illiterate, and somebody must have got the letter written, but we have no evidence whatever to show who it was who got the letter written, or, if it was got written by Laxman, how he managed to get it posted at Manmad, whence it is alleged to have come. The principal corroboration relied upon by the learned Sessions Judge and by the Assistant Government Pleader was the finding of the chopper. There undoubtedly was evidence that the chopper was made for Laxman. One may perhaps assume that, as it was made for Laxman, it still remains his property, although that is not an assumption which necessarily follows logically. But assuming the chopper to be Laxman's, there is nothing whatever to show that Laxman knew that the chopper was at the bottom of this well. There is nothing to show where the chopper was kept by him, how his custody of it came to an end, or how it got into the well, except the confession of Soni. Apart from the confession of Soni we know nothing whatever about how the chopper got into the well. It seems to me, therefore, that one cannot rely on the finding of that chopper in the well, even assuming it to be Laxman's chopper, as any real corroboration of the story told in the confession as against him. In a case of this sort one cannot shut one's eyes to the possibility of the wife, who is evidently an unscrupulous woman, conspiring with some third party to commit the murder of her husband, whom she wanted out of the way, and to throw the blame on a former lover with whom her intrigue had ceased.

There is no evidence that the intrigue continued after Nathu and Soni left Nandgaon some three months before the date of the murder. The whole of the evidence is quite consistent with the murder having been committed by some one, possibly a fresh lover of Soni, and the blame being deliberately thrown on Laxman. We have had a good deal of discussion in this case about the amount of weight which should be attached to the confession of a co-accused, and the way in which such confession should be dealt with. The learned Assistant Government Pleader contends that the confession of a co-accused should be treated on the same basis as the evidence of an accomplice, and for that he relies on certain dicta of Sir Basil Scott in 43 Bom 739,[1] and of Heaton, J., and Macleod, J., as he then was, in 38 Bom 156.[2] I have no criticism whatever to make on either of those decisions, but I am not altogether in agreement with some of the views expressed by those learned Judges. It seems to me a fallacy to say that the confession of a co-accused can be dealt with on the same basis as the evidence of an accomplice. The ordinary way of dealing with accomplice's evidence is to treat the evidence of an accomplice as the foundation of the prosecution story, and then to see how far there is any corroboration of matters which affect the accused and tend to show that the evidence is true as against him. But, in my opinion, one cannot take the confession of a co-accused as the basis of the prosecution case. The evidence of an accomplice is given on oath, and the witness is subject to cross-examination, and S. 133, Evidence Act, shows that a conviction based on the uncorroborated evidence of an accomplice is not bad in law, although in practice Courts in this country refuse to convict on such evidence. But the confession of a co-accused is not evidence given on oath in the witness box, and there is no right of cross-examination. It is not evidence at all as defined in S. 3, Evidence Act, but S. 30, provides that:

> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

The language of that section is very guarded. It does not say that the confession of a co-accused is to be treated as evidence against anyone except the confessing party. All it says is that the confession may be taken into consideration. I think that means merely that it is one relevant fact which the Court has to consider. But in my view the confession is not strictly evidence against a co-accused, and I am clearly of opinion that a conviction based solely on the confession of a co-accused would be bad in law. There are many occasions on which the Court is undoubtedly assisted by taking into consideration the confession of a co-accused. There may be the direct evidence of a single witness which the Court would be more ready to accept if supported by the confession of a co-accused. Or, in a case depending on circumstantial evidence, where the question to be decided is what is the proper inference to be drawn from all the circumstances proved, the confession of the co-accused is one of the circumstances which may help the Court in drawing a correct inference. But I protest against the suggestion that the confession of a co-accused can be treated as the basis of the prosecution case, for which it is only necessary to find some corroboration as against the accused. In the present case, even if one dealt with the evidence on that basis, I am clearly of opinion that there is no real corroboration of the confessional statement of accused 1 as against accused 2. I think therefore that the conviction of accused 2 was wrong, and the appeal must be allowed, and the accused acquitted.

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[1] Emperor v. Sabitkhan, A I R 1919 Bom 164=51 I C 657=20 Cr L J 497=21 Bom L R 448 =43 Bom 739.

[2] Emperor v. Gangappa, A I R 1914 Bom 305=21 I C 673=14 Cr L J 625=15 Bom L R 975 =38 Bom 156.

Wassoodew, **J.**—Accused 1 Soni is the widow of the deceased Nathu Bhoi, and she and accused 2, Laxman Jairam, were jointly tried in connexion with the murder of the said Nathu Bhoi, Laxman being charged as principal offender, and Soni as his abettor. At the trial the prosecution relied on the confession of Soni, the co-accused, against Laxman with such corroborative material as was available. The learned Sessions Judge acting upon that confession and certain circumstances which he has indicated in his judgment, but which, as I shall presently point out, do not confirm the identity of the co-prisoner, has convicted Laxman and sentenced him to death. The learned Assistant Government Pleader, in supporting that conviction, has asked us to treat the confession of Soni as the basis of proof of the offence charged as if it was on the same footing as accomplice testimony. He has relied on the observations of Scott, C. J. in 43 Bom 739[1] to the following effect (p. 767):

> As regards the confessions of co-accused the Indian law has no counterpart in England, but it seems to me that for the purpose of admissibility such confessions stand on the same footing as accomplice evidence and that their weight must depend on the circumstances of each case.

Upon first impression it might seem that the distinction which the law makes between the two has been in some respects whittled down in the above judgment. After carefully reading that judgment I am satisfied that there was no intention to suggest that the confession of a co-accused could be made the sole foundation for conviction of the other accused implicated therein. The learned Chief Justice took occasion to guard himself by saying that there was no distinction for the limited purpose of admissibility. That might properly imply that under the Evidence Act, just as accomplice testimony is made admissible by S. 133, S. 30 of the same Act renders the confession of a co-accused admissible. S. 30 permits the Court to take the confession of a co-accused into consideration. That is giving wide discretion to the Court even to exclude that confession altogether from consideration against the co-accused indicted, if it is so disposed. The question then arises under what circumstances would it be proper for the Court to exercise its discretion in taking that confession into consideration? The answer must be given by reference to the broad rule of natural justice and prudence which is usually applied by Courts in India to tainted testimony. My Lord the Chief Justice has just pointed out that accomplice testimony stands altogether on a higher footing than the confession of a co-accused, principally on account of the opportunity of cross-examination afforded to the accused in testing the accomplice's evidence. The Legislature therefore has used guarded language in the matter of the use of the confession of a co-accused by not treating it as evidence under S. 3, Evidence Act, and thus attaching to it a lesser degree of probability. No doubt self-implication is recognisably a guarantee for truth, and it is made a condition precedent to the admissibility of the confession. But it cannot follow that because under certain circumstances the confession of a co-accused might be taken into consideration, it should always or invariably be made the basis for a conviction. The current of judicial authority is opposed to that view, and I fail to discover anything in the judgment in 43 Bom 739[1] or the judgment of Macleod, J. as he then was, in 38 Bom 156[2] in support of the conclusion that a matter which may be taken into consideration under S. 30 can form the basis of legal conviction even if there is no evidence other than such matter. Even when the Court is inclined to take the confession into consideration, according to an unbroken series of decisions of this Court, the uncorroborated confession of a co-accused has not been considered enough to warrant a conviction of the co-prisoner.

Upon the record the question we have to determine is what weight should be given to the confession of the co-accused in view of the other evidence available. The learned Sessions Judge has relied upon the nature of the injuries indicated by the doctor, the discovery of the corpse bound in a gunny bag, and the discovery of blood-stained clothes from the house such as cap and shirt as lending corroboration to the story of Soni in her confession not only for the purpose of convicting Soni upon her own admission, but connecting the second prisoner Laxman with the crime. It has been well recognised that proof of corroborative circumstances which establish the crime is not enough for the purpose of convicting the co-prisoner implicated in the confession. There must be other corroborative proof connecting and identifying him in the crime. The discovery of the articles and the nature of the injuries merely confirm the circumstances of the crime. They cannot by any manner of reasoning identify the co-accused as the criminal. The only circumstances to which our attention has been directed as tending to such identification are the discovery of the chopper from a well upon the statement of Soni, and a pseudonymous letter which, it is suggested, has emanated from Laxman, putting the relatives and the police on a wrong scent with regard to the culprit. With regard to the chopper I cannot improve the statement of my Lord the Chief Justice in regard to the absence of cogency in that discovery. Assuming that the chopper was made for Laxman according to the evidence of the smith it does not necessarily follow that it was used by Laxman for the purpose of this crime. That chopper was admittedly produced from the well upon the statement of Soni, who, on her own showing, had concealed it there. Having regard to Soni's relationship with Laxman it was not difficult for her to obtain it from the latter if she was inclined to use it herself or to hire another person for the purpose. The suggestion that Laxman left the chopper with Soni to be disposed of by her when everything else was removed by him does not seem reasonable or proper. In fact the discovery of human blood on the chopper and the probability that it was manufactured for Laxman merely create suspicion against the latter, but they carry the case no further.

The discovery of that chopper as well as the production of the latter is not less consistent with the view which has been pressed upon us by the learned advocate for the appellant Laxman that perhaps another person had a hand in this affair. The authorship of that letter is not traced to the accused Laxman. It is important to note that the deceased's nephew Zelia was living with him and his wife at Sakora for nearly two months before his alleged disappearance from that place. If the deceased was murdered in that house, the circumstances indicate that the persons who could have an opportunity to commit that crime would be Soni and Zelia. Zelia has explained that he was away from the house and was at Manmad about that time. As regards that fact there is the word of Zelia alone, and perhaps his conduct in making an attempt to discover where Laxman was is in his favour. There are other circumstances of great importance which cannot be overlooked. According to the panchnama, Ex. 11, one shirt and a vest were found in that house with blood stains on it. Those clothes, according to the evidence of Soni, did not belong to the deceased, and they divert suspicion from Laxman whose clothes they were not. Having regard to Soni's character it is not difficult to conceive upon a supposed change in the object of her affection that she would contrive to rid herself both of her husband and the old paramour. The circumstances strengthen rather than remove that suspicion. Consequently, I am not prepared to regard the discovery of the chopper and the letter as sufficient to confirm the accusation against Laxman by the co-accused Soni. I accordingly agree that the conviction of Laxman must be set aside, and his appeal allowed. With regard to Soni, she stands condemned by her own admission, and there is sufficient corroboration as regards the truth of her complicity in this crime. I would therefore confirm her conviction and sentence and dismiss her appeal.

B.D./R.K. *Order accordingly.*

A. I. R. 1937 Bombay 35

N. J. Wadia and Wassoodew, JJ.

Bai Ganga—Applicant.

v.

Amritlal Purshottam—Opponent.

Criminal Ref. No. 41 of 1936, Decided on 4th August 1936, from Addl. Sess. Judge, Kaira.

Criminal P. C. (1898), S. 488—Jurisdiction —Application for maintenance—Mere hiring or purchase of residential building does not confer jurisdiction on Magistrate of the place to entertain petition under S. 488 against owner—Husband and wife residing for long at *V*—Husband hiring house at *N*—Wife going to *N* and taking residence there —Court at *N* has no jurisdiction to hear maintenance application by wife.

The mere hiring or purchase of a residential building at a place does not confer jurisdiction on the Magistrate of that place to entertain petitions under S. 488 against the owner. [P 37 C 1]

A husband and his wife resided together for a long time at *V* where the husband worked as a talati. The husband had also hired a house at *N*, his native place, for storing his kit. The wife left her husband and took her residence in the house at *N* and subsequently applied to the Magistrate at *N* for an order of maintenance under S. 488:

Held: that the Magistrate at *N* had no jurisdiction to entertain application as the husband did not reside there: *A I R 1930 Bom 348 and A I R 1929 Bom 410, Ref.*; *A I R 1927 All 291, Disting.* [P 37 C 1]

R. S. Parikh, *K. A. Parikh* and *D. M. Desai*—for Applicant.

U. L. Shah—for Opponent.

Wassoodew, J.—This is a reference by the Additional Sessions Judge of Nadiad under S. 438, Criminal P. C., asking this Court to interfere in exercise of its powers under S. 439, Criminal P. C., with the order of the Honorary Magistrate, First Class, Nadiad, assuming jurisdiction in an application under S. 488, Criminal P. C., for maintenance made by the wife against the husband. The facts which are not seriously disputed before us are that the parties are husband and wife and were living together as such at Viramgam for very nearly 12 or 13 years in a house hired by the husband who has been working as a talati at that place. The husband had also hired a house at Nadiad for storing his kit after separation from his coparceners. In 1934 or thereabouts the wife left her husband and came to Nadiad and lived in the hired house of the husband. The latter did not provide her with maintenance and she accordingly applied on 27th November 1935, to the Honorary Magistrate, First Class, Nadiad, under S. 488, Criminal P. C., for an order for maintenance against the husband in which she alleged that in Samvat year 1990 she last resided with her husband at Nadiad and that in consequence the Court had jurisdiction to entertain her petition. The learned Magistrate found that the husband was a native of Nadiad and had hired a house there, that he had a permanent place of residence at Nadiad, that his parents resided there and that the hired house at Nadiad "was used off and on for the joint residence of the parties on their visits to Nadiad which took place occasionally." He, therefore, concluded that although the husband was a talati at Viramgam for a number of years, his place of residence was at Nadiad and the Court at Nadiad had jurisdiction to entertain the petition. Cl. (8), S. 488, Criminal P. C., provides as follows:

> Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife.

It was admitted by the learned counsel for the wife that at the date of the petition the husband had been residing at Viramgam for the purpose of his duties as talati and that since the wife's separation from Viramgam they never lived together at Nadiad as husband and wife. He has argued that the term "resides" and the phrase "last resided" imply *animus revertendi* on the analogy of the law of domicile, that as the husband is a native of Nadiad and has hired a house there, presumably his intention is to settle down at Nadiad, and that, therefore, his residence can be said to be at Nadiad also. The learned counsel has relied on 49 All 479[1] in support of the view that mere possession of a residence by the husband is sufficient to confer jurisdiction on the Magistrate of that place in proceedings under S. 488, Criminal P. C. On a careful reading of the judgment of Ashworth, J. in 49 All 479[1] we are not satisfied that it goes so far as to lay down that the term "resides" in Cl. (8), S. 488, can in its widest implication include the mere fact of possession of a residence irrespective of the actual residence of the owner therein. In that case the parties lived at Bhatgaon in the Punjab till March 1925. In that month they came to Jarauli in the Agra district on a visit to a relative. They stayed there for a period of two months, during which period the husband occasionally visited his home in Bhatgaon. At the end of that two months' period the husband deserted his wife and returned to the Punjab. It was held that the expression "resided" in the section included a temporary residence and was not to be confined to permanent residence. The relevant passage in the judgment upon which reliance has been placed is as follows (p. 481):

> There can be no question that a person can have two residences. He may have a permanent place of residence and a temporary place of residence. The point at which a visit or a stay becomes capable of being held to be residence is one that is difficult to define. In the present case I consider that a stay for two months in a temporary place, with occasional visits in that period to the permanent place of residence, should be regarded as amounting to temporary residence sufficient within the meaning of S. 488.

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[1] Sher Singh v. Amir Kuer, A I R 1927 All 291 =101 I C 670=28 Cr L J 494=49 All 479= 25 A L J 435.

It does not follow that it is not necessary to occupy the temporary residence for the purposes of Cl. (8), S. 488. The Court was there concerned with the duration, and not with the fact of occupation which could be regarded as sufficient to satisfy the residential test laid down by the clause. In a very recent case of this Court in 54 Bom 548[2] it was held that the expression "last resided" in Cl. (8), S. 488, Criminal P. C., meant both permanent as well as temporary residence. In that case the period of temporary residence was about two months. In 53 Bom 781[3] the authorities were reviewed by Patkar, J. on the subject, and it was held that unless there was *animus manendi* a casual or flying visit to a place was excluded from the scope of the section. There is no authority, and the plain language of S. 488 does not afford jurisdiction for holding that the mere hiring or purchase of a residential building at a place would confer jurisdiction on the Magistrate of that place to entertain petitions under S. 488 against the owner. We have no doubt upon the record that the husband last resided with his wife, the petitioner, at Viramgam within the meaning of Cl. (8), S. 488, Criminal P. C., and was residing there at the time of the filing of the application, and not at Nadiad. Therefore, the learned Magistrate of Nadiad had no jurisdiction.

We accordingly accept the reference and quash the proceedings before the Magistrate.

R.M./R.K. *Reference accepted.*

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2. Sama Jetha v. Bai Wali, A I R 1930 Bom 348 =127 I C 179=31 Cr L J 1157=54 Bom 548 =32 Bom L R 764.
3. Khairunissa v. Bashir Ahmed, A I R 1929 Bom 410=1929 Cr C 462=122 I C 59=31 Cr L J 331=53 Bom 781=31 Bom L R 931.

A. I. R. 1937 Bombay 37

RANGNEKAR, AG. C. J., AND TYABJI, J.

Bhaguji Baloba Kir—Plaintiff—Appellant.

v.

Alandi Municipality and *another*—Defendants—Respondents.

First Appeal No. 176 of 1930, Decided on 1st July 1936, from decision of First Class Sub-Judge, at Poona, in Civil Suit No. 276 of 1929.

(a) Malicious Prosecution—Suit for—No suit lies unless criminal proceedings were instituted without reasonable and probable cause—Reasonable and probable cause means genuine belief based on reasonable grounds that proceedings are justified.

In a suit for malicious prosecution the plaintiff has to prove (a) that he was prosecuted by the defendant, (b) that the defendant acted without reasonable and probable cause, (c) that he acted maliciously, and (d) that the criminal prosecution terminated in the plaintiff's favour. No suit for malicious prosecution, however malicious, will lie unless the criminal proceedings were instituted without reasonable and probable cause. Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. [P 38 C 1]

Where without giving any notice to the Municipality as required by S. 96 (1), the accused began to erect new structure and the Municipal Committee launched prosecution under S. 96 against the accused:

Held: there was reasonable and probable cause for Municipality to prosecute the accused having regard to the provisions of the Bombay District Municipal Act and a suit by the accused against the Municipality did not lie. [P 38 C 1]

(b) Bombay District Municipal Act (3 of 1901), S. 96 (1), (3), (5)—Offence under S. 96 (5) is complete as soon as accused begins construction, alteration, addition or reconstruction without giving notice under sub-s. (1)—Municipality is not bound to give notice under sub-s. (3).

To establish an offence under S. 96 (5) all that is necessary is to show that the accused had begun a construction or started altering an existing construction without giving a notice thereof in writing to the Municipality as required by sub-s. (1). The Municipality is not bound to give notice under sub-s. (3), although it would ordinarily do so. But whether it does or does not give such notice, the offence is complete as soon as a person begins construction, alteration, addition or reconstruction without giving notice required under sub-s. (1). [P 38 C 2; P 39 C 1]

S. Y. Abhyankar—for Appellant.

Y. B. Rege and *G. S. Gupte*—for Respondents.

Rangnekar, Ag. C. J.—This is an appeal in a suit for malicious prosecution brought by the appellant against the Alandi Municipality and its President. The circumstances which led to the prosecution are briefly these: The plaintiff who is a contractor was possessed of a Dharmashala on the road between Alandi and Poona. This Dharmashala was completed in about 1923 under the management of his agent, one Chavan. Then it appears that at that time a katcha shed standing on wooden poles with roof covered by corrugated iron sheets was left standing adjoining the plot and was used as a store-room for timber and other materials. In 1926, as the evidence shows, the plaintiff's agent wanted to run a business of motor bus between Alandi and Poona. For this purpose he required a garage and he started utilizing the tin shed already standing for that purpose and putting up another shed which is shown on the plan as 'B.' Admittedly no permission for either extending the so-called flimsy shed or putting up another shed adjoining it was taken from the Municipality. In November 1926, the Municipality acting on the report made by its officers issued a notice to the plaintiff asking him to stop the work which he had commenced and was doing until the matter was thoroughly investigated. It is the plaintiff's case that he accordingly stopped the work. Thereafter the Municipality launched a prosecution against the plaintiff in April 1927, under S. 96, Bombay District Municipal Act, 1901. The prosecution resulted in an acquittal of the plaintiff who thereupon filed the present suit.

Now in a suit for malicious prosecution the plaintiff has to prove, (a) that he was prosecuted by the defendant, (b) that the defendant acted without reasonable and probable cause, (c) that he acted maliciously, and (d) that the criminal prosecution terminated in the plaintiff's favour. No suit for malicious prosecution, however malicious, will lie unless the criminal proceedings were instituted without reasonable and probable cause. Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. The learned Judge held that the plaintiff has failed to discharge the onus of proof that lay on him and dismissed the suit. In appeal it is contended before us that the finding of the lower Court that there was no reasonable and probable cause for the prosecution should not be accepted, and for this reason: It is said that the prosecution was in respect of a structure which was already existing before the notice of November 1926 was served on the plaintiff, and the prosecution realising the weakness of their case sought to improve it by serving another notice in August 1928, during the pendency of the prosecution with regard to a structure which admittedly was a new structure and for which no permission was sought. In our opinion the record does not support this contention. It is clear from the evidence that the prosecution was instituted in respect of a new structure. No description of the structure complained of was given in the complaint. In evidence the prosecution tried to prove what the structure was. From the judgment it appears that the Magistrate was not in a position to make up his mind as to whether the notice prior to the prosecution related to the structure already existing or to a new structure or whether the earlier notice related to a structure already existing and the later notice to the structure which was new, and as he felt some doubt, he gave the benefit of it to the accused. The only material question, in our opinion, is whether there was a foundation for the prosecution. In other words whether there was reasonable and probable cause as far as the Municipality was concerned for instituting the prosecution against the plaintiff. S. 96, sub-s. (5), Bombay District Municipal Act, prescribes the offence. It says:

> Whoever begins any construction, alteration, addition or reconstruction without giving the notice required by sub-s. (1) or without furnishing the document . . . shall be punished with fine which may extend to Rs. 1,000.

To establish, therefore, an offence under this section all that is necessary is to show that the accused had begun a construction, or started altering an existing construction or added to it or re-constructed it, without giving a notice thereof in writing to the Municipality as required by sub-s. (1); and the question whether a wrong notice, assuming that the notice in this case was wrong, was given by the Municipality or not seems to us to be entirely immaterial. The scheme of S. 96 of the Act is briefly this. Sub-s. (1) requires a person intending to erect a building or to alter or add to an existing building to give notice to the Municipality thereof in writing. Under sub-s. (2) the Municipality has the power to give permission to erect according to the plan, etc., submitted under sub-s. (1) or to impose certain conditions as to level, drainage, location of the building, etc. Under sub-s. (2-A) the Municipality may revoke the permission given and give fresh permission and may direct that until all questions as to location have been decided, the work shall not be proceeded with. Then comes sub-s. (3) which provides that before any orders under sub-s. (2) are issued, the Municipality may within one month from the receipt of such notice either (a) direct that the work shall not be proceeded with for a period not longer than one month from the date of such order, or (b) may demand further particulars. It will be seen, therefore, that the Municipality is not bound to give the notice under sub-s. (3). No doubt a Municipality ordinarily would give such a notice, but whether it does or not, in our opinion, the offence is complete under sub-s. (5) as soon as a person begins any construction, alteration, addition or reconstruction without giving the notice required under sub-s. (1). The evidence clearly shows that the plaintiff did begin to erect a new structure within the meaning of sub-s. (5). In our opinion issue 1 raised by the learned Judge was entirely irrelevant, but it does not affect the merits of the case. I think I need not discuss the matter any further. After hearing everything that could have been said by Mr. Abhyankar on behalf of the appellant, we are satisfied that the decision of the Court below is correct and the appeal must be dismissed with costs.

Tyabji, J.—I agree. There is no evidence of malice on the part of the Municipality: 56 Bom 135.[1]

R.M./R.K. *Appeal dismissed.*

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[1] Chaganlal Sakerlal v. President, Thana Municipality, A I R 1932 Bom 259=137 I C 545=34 Bom L R 143=56 Bom 135.

✻ A. I. R. 1937 Bombay 39

KANIA, J.

Indian Cotton Company, Ltd.—Plaintiffs.

v.

Hari Poonjoo and *others*—Defendants.

O. C. J. Suit No. 1404 of 1935, Decided on 11th February 1936.

(a) Interpretation of Statutes—Punctuation marks—Comma—In considering plain words of section punctuation cannot be relied upon—Interpretation of comma after the word 'towns' in S. 58, Cl. (f), T. P. Act.

In interpreting the plain words of a section, punctuation cannot be relied upon. The comma after the word 'towns' in the Transfer of Property Act, S. 58 (f), in interpreting clause should be taken to mean that the word 'towns' does not go with 'person' but with 'delivers': *14 I A 30 (P C)*; *A I R 1929 P C 69* and *A I R 1920 Bom 245*, *Rel. on*; *A I R 1915 Bom 50* and *A I R 1917 Bom 254*, *Not foll.* [P 41 C 1]

(b) Equitable Mortgage —Agreement constituted by offer of debtor to deposit title deeds and theoretical acceptance thereof by creditor must precede the actual transfer of interest in immoveable property.

To create a valid agreement, for instance, in the case of equitable mortgage, there must be an offer by the debtor to deposit the title deeds with the creditor, with an intention to create security thereon and an acceptance by the creditor of that offer theoretically, before the title deeds actually pass from the possession of the debtor to creditor. Agreement must precede before the actual transfer of interest in immoveable property. [P 42 C 1]

✻ (c) Transfer of Property Act (1882), S. 58 (f)—Mortgage by deposit of title deeds —Creditor in Bombay asking debtor outside Bombay to send title deeds by post—Post Office becomes authorised agent of creditors to receive title deeds—Transaction complete under S. 7, Contract Act, as soon as debtor posts title deeds—It however does not create an equitable mortgage inasmuch as creditor received the title deeds through Post Office as his agent and as deposit thereby becomes out of Bombay.

Under S. 58, Cl. (f), T. P. Act, it is not necessary that the person making the deposit of title deeds should be in Bombay. It is enough if he deposits the title deed of immoveable property to the creditor or his agent in Bombay with intent to create security thereon. [P 41 C 1, 2]

If there is an express or implied authority to send title deeds by post, the Post Office is the agent of the addressee; if there is no such authority, the Post Office will be the agent of the sender. [P 41 C 2; P 42 C 2]

Where the creditor in Bombay requested the debtor outside Bombay to send the title deeds of immoveable property as security by post and debtor sent them accordingly:

Held: on the debtor sending the title deeds by post on creditor's request, the Post Office became the agent of the creditor and transaction, though complete under S. 7, Contract Act, did not create an equitable mortgage as the deposit of title deeds was made outside Bombay: *A I R 1924 Bom 205*; *A I R 1926 Bom 262*; *In re Dereze, (1873) 9 Ch A 27*; *Thairwal* v. *Great Northern Railway, (1910) 2 K B 509* and *Norman* v. *Ricketts, (1886) 3 T L R 182*, *Rel. on.* [P 43 C 1]

N. P. Engineer—for Plaintiffs.

M. C. Setalvad—for Defendant 2.

Judgment.— Plaintiffs are merchants dealing in cotton and also act as pucca adatiyas. Defendants are members of a joint Hindu family and carry on business in the joint family firm name of Balkrishna Poonjoo Mali. Defendants 1 to 4 are the managers of the joint family. For several years before 1933 the defendants had employed the plaintiffs as their adatiyas in respect of their dealings in cotton in Bombay. The business was on the usual terms and interest was agreed to be paid at seven and a half per cent. per annum. Defendants consigned to the plaintiffs cotton bales for sale and against the same the plaintiffs advanced money from time to time. The market price of cotton went down and the plaintiffs demanded margin from the defendants. In September 1931, fifty bales of the defendants were lying with the plaintiffs unsold. On 31st August 1931, the defendants wrote to the plaintiffs a letter in which they offered to send promissory notes and debt bonds as margin. By their reply of 10th September 1931, the plaintiffs informed the defendants that they will not be accepted and further stated as follows :

> . . . . Therefore you will please mortgage to us for Rs. 2,500 some field owned by yourself and send the deed from the same place after getting (it) "Registered" in our name. Otherwise if there be any field which has been purchased in your name you will please send the sale-deed addressed to us simply by "registered" (post). Otherwise, if you have got with you any sale-deed in favour of another person then along with the said deed you will please send a letter written by him stating that he is giving us the said deed as taran (margin money) in connection with Balakrishna Poonju's bales. . . .

In reply, the defendants wrote a letter dated 15th September in which they stated :

> . . . .Your letter was received yesterday. Accordingly, as required by you, a sale-deed has been sent to you. The particulars thereof are :
>
> * * * * *
>
> The said sale-deed is deposited (with you) as security on account of my fifty bales of cotton which are lying with you. The said deed is in favour of Hari Poonju Mali. But we both of us are brothers and are joint. Moreover his letter of consent is also annexed hereto. You will therefore be pleased to accept the sale-deed and you will please not cause any inconvenience to Devrao Madhavrao on account of me. . . .
>
> The said sale-deed has been sent by registered post. You will please send a letter acknowledging receipt thereof. . . .

Along with this letter was sent an undated letter signed by Hari Poonju Mali in which that party stated as follows :

> But I am giving you by way of security a sale-deed for Rs. 6,000 . . . passed in my favour against the loss arising on account of rates going down . . . I have deposited the said sale-deed by way of security with you. . . .

The sale-deed mentioned in the above correspondence was sent by registered post and is produced by the plaintiffs. The bales remained unsold, and in 1933 the market having further gone down, the plaintiffs wrote six more letters calling upon the defendants "to send security" for the deficit. On 2nd February 1934, Hari Poonju Mali wrote the following letter to the plaintiffs :

> . . . .The reason for writing (this) is as follows : Field bearing survey No. 60 is allotted to the share of Balkrishna Poonju Mali. I have no dispute whatever regarding the same. You will therefore accept the sale-deed sent herewith as a security.

Another sale-deed was sent along with that letter. On 16th February 1934, the plaintiffs sent a reply in which they stated as follows :

> . . . . . You have sent 1 (one) sale-deed. It will suffice if you send similar (sale) deeds in respect of two more fields. Please therefore send a reply at once.

In reply the defendants sent an undated letter in which they inter alia stated as follows :

> . . . . . You say that you want a sale-deed for double the amount payable by us by way of security. But you have got my two sale-deeds of the value of at least Rs. 9000 this day. Notwithstanding this I do not wish to go against your wish. Therefore I have this day sent to you again a sale-deed of the value of at least Rs. 4,000. You have got in all three sale-deeds of the value of Rs. 13,000 . . . .by way of security. . . .

The plaintiffs in reply sent a letter on 7th March 1934 stating :

> . . . . . Your letter is received and the contents are noted. Similarly a sale-deed in respect of S. No. 214 (land) measuring A. 9-7G. sent therewith on account of taran (margin money) is received. . . .

The plaintiffs thereafter sold the bales and claimed a deficit of Rs. 2,632-13-11 from the defendants by their letter of 6th October 1934. At the request of the plaintiffs the defendants also confirmed that they were indebted to the plaintiffs for Rs. 2,632-13-11. The defendants at first contended that they were agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act and the Court had no jurisdiction to try the suit. The plaintiffs thereupon elected not to claim a personal decree against the defendants and proceeded with their suit only as a mortgage suit. The only point in dispute which therefore remained to be decided was whether there was a valid equitable mortgage created in favour of the plaintiffs by the defendants sending the title-deeds as mentioned above. On behalf of the defendants it is urged that having regard to the wording of S. 58, Cl. (f), T. P. Act, it is necessary that the person making the deposit of title-deeds should be in Bombay and it is not permitted to send the title-deeds by post. The clause was inserted in S. 58 by Act 20 of 1929. Before that amendment the relevant portion of S. 59 ran as follows :

> Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, ...by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Clause (f), S. 58, at present runs as follows :

> Where a person in any of the following towns, namely the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, and Akyab. . . . . delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

The contention is obviously raised because of the comma after the word towns and because in the present clause the words "in any of the following towns" are put immediately after the word "person" and before the verb "delivers." Relying on the terms of this clause it is urged that the word "person" must go with "towns" and therefore the person should be "in the towns" when the documents are delivered. It is urged that there is no hardship in interpreting the clause in this manner, because it has always been contemplated that this particular kind of mortgage could be created within the Presidency-towns and the towns mentioned in this clause, and nowhere else; for that purpose it is essential that the party delivering the title-deeds should be in Bombay. It is pointed out that the existence of the comma after the word "towns".clearly indicates that the towns mentioned in this clause do not go with the verb "delivers" but with the noun "person." In support of the contention that punctuation should be relied upon, my attention has been drawn to 17 Bom L R 56[1] and 41 Bom 588.[2] In my opinion this contention of the defendants is incorrect. In considering the plain words of a section punctuation could not be relied upon. That was held so far back as 1887 in 14 I A 30.[3] That decision was attempted to be explained away in 17 Bom L R 56[1] but that position was not accepted in 22 Bom L R 361,[4] and has been definitely negatived by the Privy Council in 31 Bom L R 702.[5] I do not think the section has introduced any change in the law as to the rights of the parties. Under the old section it was necessary that the deposits should be made in Bombay and that could be done through an agent also. Under the present provision also in my opinion it is not necessary that the debtor giving the security should be in Bombay personally. As I read the section it means that the person should deposit the title-deeds in Bombay to a creditor. I realise that it would have been perhaps better if the legislature had put the word "delivers" immediately after the word "person" in Cl. (f), instead of putting it after the various towns mentioned therein. Even taking the sequence as it is, I am unable to hold that the various towns cannot be read properly as going with "delivers" and must be read in connexion with "person" only in the section. Under the circumstances the proper construction of the clause is that the debtor should deliver, in any of the towns mentioned in the clause, to a creditor or his agent, the documents of title to immoveable property with intent to create a security thereon. The question therefore must resolve itself into a question of fact: whether on the evidence it was established that the title-deeds were delivered in Bombay.

In this connexion on behalf of the defendants it is urged that they were not in Bombay and had sent the title-deeds, at the request of the plaintiffs, by post. In the present case therefore the plaintiffs had constituted the post office their agent, expressly or impliedly, for the purpose of receiving the title deeds from the defendants, and when the title-deeds were despatched by the defendants from their native place with the required intention, the transaction was complete and the validity thereof is to be determined on that footing. It is pointed out that under S. 58, Cl. (f), it was not necessary to have an agreement preceding the mortgage by deposit of title-deeds. Even if the facts were considered from the point of view of an agreement, it is pointed out that having regard to S. 7, Contract Act, the plaintiffs had prescribed the manner in which the proposal was to be accepted, and the defendants having accepted it in that manner, the transaction was complete when the letters were posted. It is urged that if the plaintiffs had sent their representative and received the title-deeds at the defendants' native place the transaction would have been completed immediately the defendants handed over the title-deeds to the plaintiffs' representative. In the same way the post office, being the plaintiffs' agent for the purpose, the transaction was similarly completed when the title-deeds were posted. On behalf of the plaintiffs, on the other hand, it is urged, that there must be an agreement preceding the deposit of title-deeds and Ss. 4 and 5, Contract Act, would apply. It is contended that in whatever way the correspondence is looked at, the transaction would not be complete, as against the defendants, till the documents were actually received by the plaintiffs at Bombay. It is pointed out that even if after the title-deeds were sent, if the defendants sent a telegram to the plaintiffs, before the title-deeds were received in Bombay, intimating that the title-deeds were not to be taken as security there would be no equitable mortgage. It is further pointed out that under the Posts and Telegraphs Act, 6 of 1898, the defendants could have got back the documents after they had posted the same without the consent of the plaintiffs if they were so minded. It is, therefore, urged that the post office could not be considered the plaintiffs' agent in India.

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[1] Taylor v. Bleach, A I R 1918 Bom 50=27 I C 494=17 Bom L R 56=39 Bom 182.

[2] Isap Ahmed v. Abhranmji Ahmadji, A I R 1917 Bom 254=41 I C 761=19 Bom L R 579=41 Bom 588 (F B).

[3] Maharani of Burdwan v. Murtunjoy Singh, (1886) 14 I A 30=14 Cal 365 (P C).

[4] Borgonha v. Borgonha, A I R 1920 Bom 245=59 I C 931=22 Bom L R 361=44 Bom 924.

[5] Pugh v. Ashutosh Sen, A I R 1929 P C 69=114 I C 604=56 I A 93=8 Pat 516=31 Bom L R 702 (P C).

It, therefore, remains to be determined, on the evidence, whether the title-deeds were deposited in Bombay. While realizing that in some peculiar circumstances there may be no separate agreement to deposit the title-deeds, I think the agreement must ordinarily precede the actual transfer of interest in immoveable property, as defined by the term "mortgage" in the Transfer of Property Act. S. 58, Cl. (f), requires that the deposit should be with the intention to create a security and that intention must be conveyed to the creditor and the title-deeds accepted by him on that footing. Therefore, there must be an offer to deposit the title-deeds with the necessary intention and acceptance of that offer theoretically, before the title-deeds actually pass from the possession of one to the other. It may be that in certain cases, the two acts being together, it may be difficult to exactly point out the moment the agreement took place, before the title-deeds were handed over, as the agreement may be completed by the act of handing over the title-deeds by one and receiving them by the other.

The defendants strongly rely on the decision in 25 Bom L R 604[6] for their contention that the delivery of the title-deeds was to a specially appointed agent and also that the post office was the agent of the plaintiffs for receiving the title-deeds. That decision was in respect of a hundi sent by post which was lost in transit. The hundi had been endorsed and it was contended that it was sent under the instructions of the other side by post. The material dispute between the parties was whether after the endorsement the hundi was delivered to the endorsee so as to pass the title in the hundi. Mulla, J. held that to complete a transfer of the property in the hundi it must be established that there was an authority, express or implied, from the party conveyed to the sender, to send the hundi by post. If that was proved there would be delivery of the hundi to the authorized agent and the property passed. It was pointed out that under the regulations of the Indian Post Office a letter once posted cannot be reclaimed except under special circumstances.

The decisions in (1873) 9 Ch A 27,[7] (1910) 2 K B 509[8] and (1886) 3 T L R 182[9] were relied upon to show that if there was an express or implied authority to send by post, the post office would be the agent of the addressee; if there was no such authority, the post office would be the agent of the sender. Lord Hailsham's Laws of England, Vol. II, p. 629, also supports that view. The decision in (1898) A C 200,[10] also supports the same contention, in respect of delivery of goods. It cannot be disputed that title-deeds of an immoveable property would fall under the definition of "goods," within the meaning of the Contract Act. It remains, therefore, to be considered whether on the correspondence the plaintiffs had given authority, express or implied, to the defendants to send the title-deeds by post.

In my opinion, the correspondence indicates clearly that the plaintiffs asked the defendants to send the title-deeds by post. In the first letter written by them they suggested three alternatives, and although the post office is not mentioned expressly in respect of each of them, reading the letter as a whole, it is clear that the plaintiffs had intimated that the defendants should send the title-deeds by post. If so, that is sufficient to make the post office their agent to receive the title-deeds on their behalf. Reading the correspondence as a whole in 1931, it seems to me, therefore, that the plaintiffs having constituted the post office their authorized agent to receive the title-deeds and intimated the same to the defendants, as soon as the defendants sent the title-deeds accordingly, under S. 7, Contract Act, the transaction was complete. The plaintiffs' contention that the defendants could have cancelled the security before the documents were received in Bombay is incorrect because it assumes that the transaction remained incomplete when the title-deeds were posted. In respect of the subsequent title-deeds received in 1934 also the plaintiffs demanded the same and although in those letters there is no express reference to the post office, reading the correspondence as a whole, it seems clear that the suggestion was that the other title-deeds should also be sent by post. In fact they were so sent.

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[6] Thorappa v. Umedmalji, A I R 1924 Bom 205 =87 I C 226=25 Bom L R 604.

[7] Ex parte Cote: In re Deveze, (1873) 9 Ch A 27 =43 L J Bk 19=29 L T 598=22 W R 39.

[8] Thairwal v. Great Northern Railway, (1910) 2 K B 509=79 L J K B 924=103 L T 186= 17 Manson 247.

[9] Norman v. Ricketts, (1886) 3 T L R 182.

[10] Badische Anilin and Soda Fabrik v. Basle Chemical Works, Bindschedler, (1898) A C 200=67 L J Ch 141=77 L T 573=46 W R 255=14 T L R 82.

On behalf of the plaintiffs, reliance was placed on the decision in 28 B L R 226.[11] That also was a case under the Negotiable Instruments Act. Kajiji, J. held that from the mere fact that cheques were sent from time to time by post in the ordinary course of business, it could not be inferred that there was any implied request from the one party to the other to send cheques by ordinary post. In my opinion that decision does not help the plaintiffs. I recognize that the mere fact that the parties did correspond by post would not be sufficient to spell out an authority to send by post. As however in the present case an express request to send it by post was made and the first title-deed was so sent, the subsequent correspondence between the parties should be read along the same lines, and in the absence of any indication to the contrary, either in correspondence or in evidence, I think that the whole evidence justifies the conclusion of an implied authority given by the plaintiffs to send the subsequent title-deeds also by post. The plaintiffs hold these title-deeds as a result of this correspondence and therefore in my opinion the title-deeds were not deposited in Bomay within the meaning of S. 58, Cl. (f), T. P. Act, and there is no valid mortgage by deposit of title-deeds within the meaning of that clause.

The general contention about the effect of S. 18, Posts and Telegraph Act, 6 of 1898, and the rules stated to have been framed by the Governor-General in Council need not be considered. It was contended that the observations in 25 Bom L R 604[6] were on a wrong assumption that the old Act was in force. The report does not show that the Court was proceeding on the footing of the old Act and not Act 6 of 1898 when that decision was given. The post office rules put before the Court, on the face of them, are only issued under the authority of the Post-master General and the learned counsel for the plaintiffs did not draw my attention to its publication in the "Government Gazette" or to any statement indicating that they were made or published by the Governor-General in Council under S. 18 of the Act. I had therefore no occasion to consider the exact effect of those rules on the facts of this case. The suit will, therefore, be dismissed with costs.

P.R./A.L. *Suit dismissed.*

A. I. R. 1937 Bombay 43

DIVATIA, J.

Bala Dhondi Satwade—Appellant.

v.

Baya Bhagvant Patil—Respondent.

Second Appeal No. 830 of 1931, Decided on 22nd July 1935, from decision of Sub-Judge, Islampur, in C. S. No. 919 of 1928.

(a) Hindu Law—Alienation—Widow—Gift—Gift by Hindu widow of entire property inherited from husband, jointly in favour of minor daughter who is next reversioner and her husband is invalid.

No doubt when a widow and the next reversioner pass a deed in favour of a stranger the transaction would be valid, but the rule does not apply to the case of an alienation by widow in favour of a stranger and the reversioner jointly especially where the reversioner is a minor. [P 45 C 1, 2; P 46 C 1]

A gift therefore by a Hindu widow of the entire property inherited by her from her husband jointly to her minor daughter, who is next reversioner, and to her husband is not valid. The property remains in the hands of a widow as a Hindu widow and can be claimed by a person who is the next reversioner at the time of her death: *A I R 1934 Bom 351, Ref.* [P 46 C 1]

(b) Deed — Construction—Deed of gift executed by Hindu widow jointly in favour of minor daughter and her husband—Intention clear that son-in-law also to be benefited as he looked after maintenance of widow—Deed held to be joint deed of gift in favour of daughter as well as son-in-law.

Where a Hindu widow executed a deed of gift in favour of her minor daughter and her husband, even though the daughter was the next reversioner, clearly stating therein that both these persons were joint donees and that the son-in-law was also intended to benefit by the deed because he was looking well to the maintenance of the widow and that she was sure that he would also look after her in future :

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[11] Jagjivandas v. Nagar Central Bank, A I R 1926 Bom 262=93 I C 619=28 B L R 226=50 Bom 118.

Held : that the deed of gift was joint deed of gift in favour of the daughter as well as the son-in-law. [P 45 C 1]

P. S. Bakhale—for Appellant.

K. N. Koyajee—for Respondent.

Judgment.—This is a plaintiff's appeal in a suit to recover possession of certain property as reversionary heir of one Manjula. The suit property belonged originally to one Vakuji and the plaintiff is a separated brother of Vakuji, who died leaving Manjula as his widow. She had a daughter named Goja, who was married to one Dnyanu in 1913. On 10th July 1913, Manjula, who was in possession of the property as a Hindu widow, made a deed of gift in favour of her daughter Goja and Goja's husband Dnyanu. Goja was a minor at that time and therefore the gift was made to her through her guardian and husband Dnyanu. It is clear that this gift was a joint gift in favour of these two persons. She says in the deed of gift that she had selected Dnyanu as her son-in-law according to her choice and had brought him to her house, and then with reference to both the donees she proceeds :

> As you are looking well to my maintenance and I am sure will also look after the same in the future, and as I have no other affectionate relative except you, and as my property is bound to go to you by right of heirship after my death, taking all these facts into consideration, I give the following property as gift to you both.

Soon after the execution of this gift-deed Dnyanu died in 1915 and Goja died in 1917 during the lifetime of Manjula, who died in 1918. The plaintiff, who is the reversioner living at the time of Manjula's death, seeks to recover possession of this property on the ground that the deed of gift made by Manjula was void and not binding against the plaintiff, that it did not vest the property either in Goja or in her husband Dnyanu. The property is in the possession of Goja's minor daughter, and she being a daughter's daughter of Vakuji, would not have any claim to this property in preference to the plaintiff who is the next male reversioner.

Both the lower Courts have dismissed the suit on different grounds. The trial Court was of opinion that the deed of gift was a gift of the whole property in possession of Manjula, and therefore must be regarded as a valid surrender by a Hindu widow in favour of the next reversioner living at that time, namely Goja, and it held on the authorities that the gift can be regarded as a gift to the daughter of the whole property, as an acceleration of her right as reversioner, and a simultaneous gift with the consent of the reversioner, to her husband Dnyanu, and on that basis the transaction was a valid one, and that therefore Goja's daughter was entitled to the property on her death. The appellate Court has realised the difficulty of that view, because in order that the doctrine of acceleration and simultaneous implied consent may apply, it is necessary that the reversioner herself must give consent to the gift in favour of a third party. But here Goja was a minor incapable of giving her consent, and she was represented by the very person in whose favour the consent was to be given, viz., her husband, and therefore for this double reason, it was difficult to maintain the position that the transaction was valid on the ground of surrender in favour of the reversioner and consent by the reversioner in favour of an alienation to a stranger. But the appellate Court has confirmed the decision of the trial Court on a different ground, and that ground is that although the son-in-law Dnyanu is joined in the deed of gift and is expressly stated to be a joint donee, still the facts and the circumstances show that the widow Manjula intended to give this property to her daughter Goja alone, and that the son-in-law Dnyanu who was living as ghar javai in the house, was joined only as a formal party with no intention of giving any property to him, and it is on that ground alone that the learned Judge has held this deed to be a valid deed, as a surrender by the widow of her whole interest in the property in favour of her daughter, no interest whatever attaching to the son-in-law. Goja thus became the absolute owner of the whole property, and on her death her daughter became her heir in preference to the plaintiff.

It is against this decree of the appellate Court, that the present appeal has been filed, and it is contended that that decree is wrong because the deed of gift expressly makes both the donees as joint donees, that Dnyanu, the son-in-law, was not intended to be only a formal party, and that the doctrine of consent would not apply because Goja was a minor. It has been contended on the other hand for the respondent that the intention of the woman must be to benefit her daughter Goja alone because in the body of the document she says that "my property is bound to go to you by right of heirship," and that would refer to the daughter Goja alone and not to the son-in-law. But I think this would be ignoring the other expressions in this deed in which it is clearly stated that both those persons were joint donees and that the son-in-law was also intended to benefit by this deed, because, as expressly stated in this document, he was looking well to the maintenance of the widow and she was sure he would also look after her in future. I think, therefore, that this document is a joint deed of gift in favour of the daughter as well as the son-in-law. Besides, the appellate Court, to my mind, has made out a new case in favour of the defendant. In the written statement it was conceded that Goja as well as Dnyanu were both donees under the deed of gift, and that they remained in possession of the property till the death of Manjula. I think, therefore, that this case, on which the lower appellate Court has mainly proceeded, was not only not the case of the defendant, but being one which is against the plain terms of the deed of gift itself, must be discarded, and that deed must be taken to be a joint deed of gift.

Then the question is whether this deed is valid. It is clear that under the Hindu law a widow is entitled to accelerate the vesting of the property in favour of the next reversioner, provided she effaces herself by surrendering the whole of the property in her possession as a widow at that time in favour of the next reversioner. With regard to an alienation in favour of a stranger and not to the reversioner, the position is that if the alienation in favour of a stranger is made either by the widow and the reversioner jointly, or with the consent of the reversioner, then it is a good alienation whether it is only of a part or of the whole of the property. If it is an alienation without consideration in favour of the next reversioner, it must, in order to be valid, amount to a surrender and the surrender must be of the whole of the property in her possession. Next comes the case of an alienation in favour of a stranger alone, or both the reversioner and the stranger. If it is complete alienation to a stranger without consideration or legal necessity and without the consent of the next reversioner, then the transaction is clearly bad in law; but if the widow and the next reversioner join together in transferring all her rights in the whole property in favour of a stranger, then according to the authorities such a transaction would be good on the principle that as the reversioner has become an executant party to the deed, the property must be taken to have been surrendered to the reversioner, who must be deemed to have made a simultaneous alienation of the property in favour of the stranger, and what could have been done by two separate documents could be done by one document. On this principle in a very recent case of this Court, in 36 Bom L R 671,[1] where a Hindu widow, who had inherited her husband's estate, and her daughter, who was the next reversioner, jointly passed a deed of gift of the entire estate in favour of a third person, and subsequently the widow adopted the plaintiff, who sued to set aside the alienation, it was held, dismissing the suit, that the transaction was valid as it could be treated as a surrender by the widow, plus a gift by the next reversioner. So far the position in law is quite clear.

But what would be the case where the reversioner herself is a minor and is represented, as in the present case, by the very person to whom the property is to be deemed to have been alienated? So far as I have been able to see, there is no reported case on such facts, but I think the principle upon which the cases have proceeded establishes that it is only when you can spell out a consent on the part of the reversioner for an alienation in favour of a third party, that it can be said that the transaction would be valid in law. No such consent can be implied where the reversioner is a minor and therefore incapable of giving consent. But here there is a further difficulty and that is that the minor is represented by her husband who himself is the person to whom the property is deemed to have been given on behalf of the minor. So that it is the case of a guardian alienating the property in his own favour. Such a transaction cannot be supported on the ground of interest of the reversioner herself, because it is clear that even if a minor's consent is to be implied, it can be so only if it is for her benefit, and when the property is gifted away, as in this case it has been done at least jointly in favour of a stranger, that is clearly an alienation which is adverse

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1. **Yeshvanta v. Antu, A I R 1934 Bom 351=154 I C 252=36 Bom L R 671=58 Bom 521.**

to the interest of the minor. I may also point out here the difference between the two modes of transferring. The widow and the next reversioner may join together in passing a deed in favour of a stranger. If in that case the reversioner is a major, the transaction would be valid. But if he is a minor, though represented by a guardian, I do not think it can be said that the transaction is a surrender to the reversioner, and then again an alienation by the reversioner in favour of a stranger, because the consent required is the consent of the reversioner himself. But even assuming for the sake of argument that in such a case the consent of the guardian would be regarded as the consent of the minor, still the position would be different where, as in the present case, the transaction is entered into not jointly by the widow and the next reversioner, but by the widow alone in favour of the reversioner and a stranger.

In the former case the alienation is wholly in favour of the stranger, while in the latter case the alienation is a joint alienation in favour of a reversioner as well as a stranger, and in so far as it is even a partial alienation in favour of the stranger, it is adverse to the interest of the reversioner. If the reversioner were a major, then possibly it may be argued that the reversioner consents to at least some property being given to the stranger, but where the reversioner is a minor, and still more where the alienation is in favour of the guardian of the minor himself, I do not think it can be said that the transaction is valid, because it is neither in the interest of the minor reversioner nor with his consent. I think, therefore, that the transaction in this case is not valid, and that the defendant does not take any interest under it, and that after the death of Goja and her husband the property remained in the hands of Manjula as a Hindu widow, and as on the death of Manjula in 1918 the plaintiff was the next reversioner, he would be entitled to succeed to it. The decree of the lower appellate Court is, therefore, reversed, and the plaintiff is declared entitled to the reliefs which he has sought, namely, the possession of the property and mesne profits, as prayed for. There will be an inquiry into the amount of mesne profits to be awarded. The appellant is entitled to his costs throughout.

R.M./R.K. *Decree reversed.*

A. I. R. 1937 Bombay 46

BROOMFIELD AND SEN, JJ.

Sahebrao Baburao — Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 230 of 1936, Decided on 3rd September 1936, against order of Addl. Sess. Judge, Ahmednagar.

(a) Penal Code (1860), S. 206—Attachment of property—Property left in safe custody of decree-holder accused — Property found diminished while in custody—No offence under S. 206—Sanction under S. 195, Criminal P. C., to prosecute is not necessary.

Accused was a decree-holder and in the execution of his decree attached certain grain and livestock from complainant's possession who was a judgment-debtor. The attached property was left in the custody of the accused for being produced whenever he was ordered to do so. On the property being sold, it was found that some of the property was missing. Therefore complainant asked the Court to sanction prosecution under S. 195, Criminal P. C., for offences under Ss. 403, 206, 109, Penal Code. On such sanction being refused he filed complaint on which the accused was convicted under Ss. 403 and 109, Penal Code. On revision by the accused, it was contended that the offence committed properly came under S. 206, Penal Code, and in the absence of sanction his conviction could not stand:

Held : that the facts did not constitute an offence under S. 206, Penal Code, and hence no sanction was necessary : *A I R 1932 Mad 253* ; *A I R 1929 Mad 21* and *A I R 1917 Cal 708*, *Disting.* [P 48 C 1]

(b) Penal Code (1860), S. 206—Meaning of word 'taken' explained.

The word 'taken' in S. 206 has been used in the sense of 'seized' or 'taken possession of.' [P 48 C 1]

(c) Penal Code (1860), Ss. 206, 406—Difference between—Criminal intention different in each offence.

An offence punishable under S. 406 is substantially a different offence from the one punishable under S. 206. The criminal intention necessary for an offence punishable under S. 206 is that of fraudulent prevention of property or any interest therein from being forfeited or taken in execution of a decree or order. Such an intention is certainly materially different from the intention required in an offence punishable under S. 406. [P 48 C 1]

J. G. Rele—for Accused (Applicant).

P. B. Shingne—for the Crown.

K. S. Daunkar—for Opponent.

Sen, J.—The present criminal proceedings have originated from a civil litigation between the applicant and one of his brothers on the one hand and his elder brother on the other in the Court of the First Class Subordinate Judge, Ahmednagar. The applicant and his brother obtained a decree in their favour on 27th March 1934 against their elder brother, who is the complainant in the present proceedings. Following the decree there was an application in execution on 12th April 1934, and on 24th April 1934 the Court issued a warrant for the attachment of the moveables in the possession of the opponent-complainant. The bailiff attached a considerable amount of moveable property consisting of grain and live-stock from the possession of the complainant and this property was handed over to the applicant on 29th April 1934 on the applicant's passing what is called a jimmapatra, by which he admitted that the said property had been given in his possession by the bailiff, and undertook that if the goods were misappropriated he would abide by the orders of the Court and that he would produce the goods whenever called upon by the Court to do so. Thereafter there were two sales, on 14th December 1934 and on 2nd February 1935, fetching Rs. 90 and Rs. 551 respectively. The total of these sums being less than the estimated value of the property that had been given into the applicant's possession it was discovered that the quantity of grain sold was less than the quantity delivered to the applicant and that the applicant had failed to produce thirty-five goats that had been handed over to him on 29th April. Thereupon the opponent prayed for sanction to prosecute the applicant and three others under Ss. 403, 406 and 109, I. P. C., but the learned Subordinate Judge held that the offence in question was not covered by S. 195, Criminal P. C., and accordingly refused to pass an order under that section. Thereafter, on 13th August 1935, the opponent filed a criminal complaint against the applicant and three others under Ss. 403, 406 and 109, I. P. C. In the Magistrate's Court the accused again raised an objection on the ground that the civil Court had not made a complaint in writing as required by S. 195, Criminal P. C., but the Magistrate took the same view as the learned Subordinate Judge and held that no order under the said section was necessary. The applicant was convicted under Ss. 406 and 109, I. P. C.

The only legal point that has been urged by Mr. Rele for the applicant is that the facts alleged against the accused constitute an offence punishable under S. 206, I. P. C., and that therefore it was necessary for the civil Court to make a complaint in writing in respect of such offence under S. 195, Criminal P. C. In this connexion the learned Advocate for the applicant has relied on 55 Mad 343,[1] which was a case in which a complaint was lodged by a private person alleging the commission of an offence under S. 193 and other offences in respect of which a complaint under S. 476, Criminal P. C., was not necessary, and the Court took cognizance of the offences alleged but actually convicted the accused under Ss. 467 and 109, I. P. C. It was held that the Court could not evade the provisions of S. 195, Criminal P. C., by dealing under Ss. 467 and 109, I. P. C., with what was in effect an offence under S. 193, I. P. C. This decision followed an earlier decision in 56 M L J 208.[2] Our attention has also been drawn to 44 Cal 970[3] in which on a complaint having been found to be false and the accused having applied for sanction under S. 195, Criminal P. C., to prosecute the complainant under S. 211, the Court refused sanction under S. 195 ; there was, however, a complaint against the complainant under S. 500, I. P. C., based on the same facts on which the complaint under S. 211 was based, and it was held that as the offence, though described as an offence under S. 500, I. P. C., still remained an offence punishable under S. 211, process should not have issued under the former section when the Court had refused sanction under the latter section. It becomes necessary, in order to see the applicability of these decisions, to examine whether, as alleged by the applicant, the facts in this case did actually constitute an offence punishable under S. 206, I. P. C. That section runs as follows :

> Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of justice or other competent authority, or from being taken in execution of a decree or order

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[1] *In re* Ravanappa Reddi, A I R 1932 Mad 253 =1932 Cr C 182=136 I C 779=33 Cr L J 361=55 Mad 343.

[2] Perianna Muthirian v. Vengu Aiyar, A I R 1929 Mad 21=114 I C 360=30 Cr L J 322= 56 M L J 208.

[3] Prafulla Kumar Ghose v. Harendra Nath Chatterjee, A I R 1917 Cal 708=38 I C 761 =18 Cr L J 377=44 Cal 970=21 C W N 253 =25 C L J 445.

which has been made, or which he knows to be likely to be made by a Court of justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

It is contended by Mr. Rele that this was a case of removal or concealment of property with the intention of preventing that property from being taken in execution of a decree. It must, however, be remembered that in this case the property in question had already been attached under a warrant and handed over to the applicant. That being so, it is difficult to see that it could again be taken in execution of a decree or prevented from being so taken. It seems to us that the word "taken" in this section has been used in the sense of "seized" or "taken possession of." This is indicated by the marginal note to the section "fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution." There is no question that the applicant was holding the property not in his own right but on having been given possession of it by an order of the civil Court. It appears to us, therefore, that it is not possible to say that the applicant could do anything to prevent that property or any part thereof, from being taken in execution of a decree or order in the sense in which these words are used in the section. That being so, the decisions referred to above obviously cannot apply to the offence for which the accused has been tried.

There seem to be one or two more other matters also in respect of which this case can be distinguished from the cases relied on by the learned advocate for the applicant. In the first place, it does not appear that the applicability of S. 206, I. P. C., has at any time been sought to be made out or has been made out earlier in these proceedings, nor has sanction with regard to this section been refused by the civil Court. Secondly, the offence under which the accused has been convicted, viz., an offence punishable under S. 406, is substantially a different offence from the one punishable under S. 206. The criminal intention necessary for an offence punishable under S. 206 is that of fraudulent prevention of property or any interest therein from being forfeited or taken in execution of a decree or order. Such an intention is certainly materially different from the intention required in an offence punishable under S. 406. We, therefore, hold that the decisions relied on by Mr. Rele do not apply to the facts of this case and that the trial of the accused has not been vitiated by the non-observance of the requirements of S. 195. The rule is accordingly discharged.

Broomfield, J.—I agree. The cases cited by Mr. Rele would apply only where there is an offence which is primarily and essentially one for which sanction is required under S. 195. In two of the cases sanction had actually been refused. Under such circumstances to prosecute on the same facts for an offence under another section of the Indian Penal Code would clearly be an evasion of the provisions of S. 195. That is not the case here. Even if the facts could be brought within the four corners of S. 206, I. P. C., which is extremely doubtful as my learned brother has pointed out, the offences of breach of trust and of fraudulently removing or disposing of property to prevent its seizure in execution, are essentially different offences. I may mention, although the case was not cited in the argument, that in 25 Bom 90[4] Ranade, J. expressed a view which is apparently contrary to the view taken by the Madras High Court. He said (p. 95):

> An offence under S. 205 (i. e., of the Indian Penal Code) requires sanction before it can be inquired into by any Court. Supposing sanction is not granted under S. 205 by the Court before which false personation for purposes of a suit was committed, it surely does not take away the authority of the Courts to proceed under S. 170 or S. 171 if the evidence warranted such a conviction. This same remark would apply to Ss. 206 to 210, which relate to fraudulent claims made or prosecuted in civil Courts. If, for want of sanction, these offences could not be inquired into, it does not follow that the fraud should remain unpunished, if it could be proved under other sections of the Code. . . . . .

B.D./D.S. *Rule discharged.*

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[4] Queen-Empress v. Anant Puranik, (1901) 25 Bom 90=2 Bom L R 653.

A. I. R. 1937 Bombay 48

RANGNEKAR, AG. C. J. AND TYABJI, J.

In the matter of *an Advocate.*

Civil Appln. No. 544 of 1936, Decided on 10th July 1936.

High Court—Jurisdiction—High Court has jurisdiction to reinstate pleader who has been struck off the roll for professional misconduct—Test to decide whether applicant pleader should be reinstated is whether applicant has, since his expulsion, honestly endeavoured to rehabilitate his character, so that if restored he will be upright and honest in his dealings.

The High Court has, under its general power of superintendence over pleaders, jurisdiction to reinstate on its roll a pleader, who has been struck off the roll for professional misconduct. [P 49 C 2]

In deciding whether the applicant pleader whose name had been struck off the rolls for professional misconduct should be reinstated as a pleader again, the test is whether the sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty and whether during the period between his expulsion and the date of the application for reinstatement, the applicant's conduct has been such as to satisfy the Court that he might be safely entrusted with the affairs of his clients and re-admitted to an honourable profession without that profession suffering degradation. What the Court has to see is whether the applicant has, since he was expelled, honestly endeavoured to rehabilitate his character so that if restored to the bar, he will be upright and honest in his dealings: *King* v. *Greenwood, (1760) 1 W Bl 222; In re Pyke (1845) 1 N P C 330* and *38 Cal 309, Rel. on.* [P 49 C 2]

H. C. Coyajee, M. B. Dave and *W. B. Pradhan*—for Applicant.

B. G. Rao—Opposing the application.

Rangnekar, Ag. C. J.—This is an application made to us under our general power of superintendence over pleaders. The applicant is a B.A. LL.B. of the Bombay University and was enrolled as a High Court Pleader and was practising as such in this Court as well as in Courts subordinate to it from January 1917, under a sanad issued to him by this Court. It appears that in 1922 he succumbed to the lure of the Stock Exchange, and that apparently seems to be the beginning of his difficulties. Ultimately in 1925 he found it necessary to apply for being adjudged an insolvent. Pending his application in the Insolvency Court he was permitted to practise, but for some reason or other which is not clear that permission was withdrawn. In May 1934, he obtained his discharge from the Insolvency Court on the condition of his submitting to a decree for Rs. 1,500 in favour of the Official Assignee. Pending his insolvency application he misappropriated a sum of Rs. 100 entrusted to him by one of his clients, in consequence of which he was prosecuted and convicted and sentenced to pay a fine of Rs. 100 and two months' rigorous imprisonment. On appeal the conviction was confirmed, but the sentence of imprisonment was reduced to the period of two days during which he had been in jail. In December 1929, on a petition presented by the Government Pleader, the Court ordered him to be struck off the roll. He now applies that the sentence of expulsion should be set aside and he should be reinstated on the roll and re-admitted to the office of a pleader.

The first question is whether this Court has jurisdiction to reinstate a pleader after he has been struck off the Roll. I entertain no doubt on that question. It is clear from the authorities that the Court has and must have the power to reinstate a pleader even though the Court, for professional misconduct, had struck him off the Roll. I need only refer to (1760) 1 W Bl 222,[1] in which it was held that the striking off the Roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the Court saw good cause. In (1845) 1 N P C 330,[2] Cockburn, C. J. observed that both on principle and precedents sentences of exclusion from either branch of the profession need not necessarily be exclusion for ever. Then the only question is what are the principles which should guide this Court in considering whether a person in the position of the applicant should be reinstated and re-admitted to the office which he once held. The authorities to which we have been referred show that the test is whether the sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, and whether, during the period between his expulsion and the date of the application for reinstatement, the applicant's conduct has been such as to satisfy the Court that he might be safely entrusted with the affairs of clients and re-admitted to an honourable profession without that profession suffering degradation: per Cockburn, C. J. in (1845) 1 N P C 330.[2] What the Court has to see is whether the applicant has, since he was expelled, honestly endeavoured to rehabilitate his character so that if restored to the bar, he will be upright and honest in his dealings.

It remains therefore to be considered whether the applicant has put before us sufficient evidence to satisfy our conscience that he has fufilled that test to which I have referred. On that point we entertain no doubt. The evidence which has not been impugned by the Government Pleader, who after stating some facts left the matter entirely to us, clearly furnishes

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[1] King v. Greenwood, (1760) 1 W Bl 222.

[2] *In re* Pyke, (1845) 1 N P C 330.

cogent proof that the applicant has not only sufficiently atoned for the offence which he had committed, but that his conduct during this period, during which he was prevented from carrying on his ordinary profession, has been such as to inspire confidence in this Court that should he be re-admitted, the profession as a whole will not be degraded. This evidence consists of three affidavits made by persons in whose employment he was from time to time when the sentence was inflicted on him. These affidavits show not only that he discharged the duties which he had undertaken to the satisfaction of his employers, who seem to be respectable men, and that he attended to their legal affairs to their satisfaction, but that although he was entrusted with large sums of moneys he scrupulously accounted for the same to their satisfaction. Then there is further evidence as regards the character and conduct of the applicant which in my opinion is entitled to much greater weight, and this consists of a statement signed by numerous members of the bar, with whom he must come in contact if his application is accepted. Among the signatories there are some who are the leaders of the bar to which the applicant belonged, and some of whom have also held responsible judicial offices under Government. According to these gentlemen "the applicant has done his utmost to make amends for his previous misconduct and conducted himself honourably during the period of six years." Then they say that if this Court in the exercise of its powers of general superintendence is pleased to re-admit him to the roll of pleaders, they are satisfied that he would justify the clemency shown to him and act with integrity and honour. Then there is an affidavit of the very client whose money the applicant had embezzled, and it shows that the amount which as I have stated was Rs. 100 has been made good to him and he has now no complaint against him. When the sentence of expulsion was passed the Chief Justice in his judgment observed as follows:

> His counsel is naturally unable to challenge the conviction which has been affirmed by this Court. But he has pleaded that his client ought to be treated with leniency having regard to the apology that he makes, and his promises for future good conduct, and to the fact that he is a pleader of some 11 years' standing with originally a creditable and even a brilliant academic record.

These remarks as regards the antecedents of the applicant seem to be borne out by the materials before us. In these circumstances, I think, we should accept the application, set aside the sentence passed upon him and order that he should be re-admitted to the roll of pleaders. The applicant will have to pay the costs of the Government Pleader.

Tyabji, J.—I agree. The cases have been collected in 38 Cal 309;[3] and the principle derived is that the Court will grant a petition by a practitioner who has been struck off the roll, and re-admit him, on being satisfied that the sentence of expulsion has had the salutary effect of awakening in the petitioner a higher sense of honour and duty than he evinced when disciplinary action became necessary; and that in the interval his conduct has been such that notwithstanding his prior delinquency he might be safely entrusted with the affairs of clients and received once again as a member of an honourable profession without detriment to the profession or the disparagement of the colleagues with whom he must work and without impairing the dignity of the Courts. To ensure adequate atonement and amelioration the Courts require sufficient time to elapse before re-admission. In the earliest case referred to in 38 Cal 309[3] the comparatively short period of two years was deemed sufficient; in two cases three years; but in the majority of cases the lapse of five, seven and ten, and even 12 years was insisted upon. The period must naturally depend upon the nature of the offence and the evidence regarding the petitioner's conduct and activities after his name was struck off the roll. The petitioner before us has reimbursed and otherwise made reparation to the client who suffered loss by the petitioner's misconduct. The injured party has made an affidavit evidencing that he is entirely propitiated by the amends he has received. The petitioner has in the meantime stood the test of working in capacities where considerable trust had to be reposed in him and in which susceptibility to temptation would be put to the proof. He also acted with honour in the exacting and elevating professsion of a teacher. The materials before us are sufficient to show that the petitioner has for an adequate period acted in such a manner as will permit the Court to exercise its discretion of allowing him a chance of redeeming his character. I therefore agree in the order proposed.

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[3] *In re* Abiruddin Ahmed, (1911) 38 Cal 309=8 I C 108=12 Cr L J 22=15 C W N 357.

R.M./R.K. *Application accepted.*

A. I. R. 1937 Bombay 51

RANGNEKAR, AG. C. J. AND TYABJI, J.

Gundayya Hanmant Naik—Defendant—Appellant.

v.

Shriniwas Narayan Naik—Plaintiff—Respondent.

First Appeal No. 23 of 1930, Decided on 17th June 1936, from decision of First Class Sub-Judge, Karwar, in C. S. No. 220 of 1928.

(a) Hindu Law—Alienation— Coparcener—Power of, in Bombay School.

In Bombay Presidency a coparcener can sell, mortgage or otherwise alienate his interest in the coparcenary property for value. [P 51 C 2]

(b) Hindu Law — Partition— Unequivocal declaration is enough.

All that is necessary under Hindu law to effect a partition is an unequivocal declaration by a coparcener of his intention to separate and enjoy his share in severalty. [P 52 C 1]

(c) Hindu Law—Alienation—Coparceners—Law in Bombay Presidency — Between two coparceners, gift by one to another is valid.

The disability on the part of a coparcener to gift away his undivided interest depends upon the principle that it is subverse of the right of partition which is inherent in a coparcener and secondly, it is not possible for a coparcener until partition to say that he is entitled to any particular share. The true principle is that a coparcener cannot do any act which is to the prejudice of his other coparceners, or which infringes their rights over the common property, except with their consent, express or implied. In Bombay Presidency however the law has much mitigated the rigour of the strict principle of Hindu law. In coparcenery of two persons the two coparceners between themselves are entitled to the whole property and it is open to one of them with mutual concurrence to gift his share in the undivided property to the other: *9 Beng L R 377 (P C), Ref.; A I R 1926 P C 54, Rel. on.* [P 52 C 1, 2]

M. R. Jayakar and *K. H. Kelkar*—for Appellant.

G. N. Thakor and *G. P. Murdeshwar*—for Respondent.

Rangnekar, Ag. C. J. —(The judgment, after dealing with the construction of Ex. 70, Swatantra Mukhtyarnama, proceeded.) This brings me to the second contention of the appellant. It is argued that Ex. 70 was merely a deed of gift, and as the family was joint, the gift is bad. A short answer to that contention is that it was not a mere gift. The deed read as a whole shows that there was a proposal made by the plaintiff which was accepted by Durgaya, in other words, the deed was the result of an agreement between the parties, and there was consideration for it. By the arrangement or agreement one party agreed to undertake certain liabilities and in consideration of it the other party transferred his interest in the joint property to him. No authority is cited to show that such an agreement is not allowed by Hindu law. It is well settled in this Presidency that a coparcener can sell, mortgage or otherwise alienate his interest in the coparcenary property for value.

It is said that the plaintiff was to carry out the liabilities out of the property given to him. This strictly is not correct. It does not apply to the payment of the debts of Durgaya if our reading of the deed is correct. Then there are some other liabilities which the plaintiff was to discharge at his expense. This is clear from the very last clause beginning with "You should not only perform at your own expense . . . . . ." at pp. 79 and 80, read as a whole. Apart from this however the fact remains that the plaintiff had undertaken to carry out several duties and this undertaking itself would be sufficient to support the agreement. But assuming that this was not a transfer for value, what is the position ? I shall first summarize the appellant's contentions. He says that there was no severance in the four branches until three years prior to the partition-deed, and therefore in 1920 when Ex. 70 came to be made, the family was joint, and that being so, the gift is bad. Alternately the appellant contends that in any event the plaintiff and Durgaya were, as between them joint at the date of Ex. 70, and so the gift is bad. First as to the question of fact. It is true that the partition-deed on the face of it shows that the members of this family had severed in interest some three years prior to it. The learned Judge on a careful consideration of the evidence has held that no particular importance be attached to the mention of the period of three years in the deed, and I agree with him, and for this reason, that this particular period of three years finds a place even in the earlier document of 1920, so that the mention of the period of three years, as the learned Judge has held, and rightly in our opinion, is merely approximate.

The earlier document of 1920 shows that the members of the family were living separately, moveable property was divided and the members of the family were dividing the income of the immoveable property among themselves. There is other evidence on the record to show that since 1916-17 there were dissensions going on between the members of the family, and most of them were living separately and dealing with their share of the income separately. It is clear on the authorities that all that is necessary under Hindu law to effect a partition is an unequivocal declaration by a coparcener of his intention to separate and enjoy his share in severalty. In the present case the parties have gone much beyond a mere declaration. We agree therefore with the lower Court in holding that the family had severed in interest before 1920 but that the plaintiff and Durgaya as between them continued joint. Therefore the only question is whether it was open to Durgaya to make a gift of his share in the joint property belonging to him and the plaintiff to the latter, and which the latter accepted. The evidence shows that upon execution of Ex. 70 the deed was handed over to the plaintiff and accepted by him. It remained with him until he gave it to Durgaya on certain representations to which it is unnecessary to refer. Speaking for myself I see no principle of Hindu law which could be invoked to invalidate such a gift. So far back as in 9 Beng L R 377[1] the Privy Council clearly indicated the principle underlying the law of gift under Hindu law. Their Lordships say (p. 396) :

> The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be alienated by the holder without the concurrence of those who are interested in the succession. . . . .

The disability on the part of a coparcener to gift away his undivided interest depends upon the principle that it is subversive of the right of partition, which is inherent in a coparcener, and, secondly, it is not possible for a coparcener until partition to say that he is entitled to any particular share. In my opinion the true principle is that a coparcener cannot do any act which is to the prejudice of his other coparceners, or which infringes their rights over the common property, except with their consent, express or implied. In our Presidency however the law has much mitigated the rigour of this strict principle of Hindu law. I am therefore unable to see why if two coparceners between themselves are entitled to the whole property, it is not open to one of them with mutual concurrence to gift his share in the undivided property to the other. This view derives support from the observations of the Privy Council in 53 I A 123[2] to which the learned Judge has referred. One other answer made by the respondent has been accepted by the learned Judge of the Court below. It is that the deed, Ex. 70, evidences a family arrangement and as such it is valid in law. The recitals support the view and we agree with it. In the result the appeal will be dismissed with costs.

Tyabji, J.—I agree. The transfer in question was for consideration, made by Durgaya in favour of his nephew the plaintiff. Among other things it was agreed between them that the nephew should succeed to the property on Durgaya's death, and that Durgaya himself should not deal with the property in favour of any other person. Subsequently in contravention of this agreement Durgaya purported to transfer the property to defendant 1, a distant relative. It seems to me that he was not authorized to do so; and the second transfer must give way to the earlier transaction which was for consideration—the consideration having already been received to a great extent by the transferor. For this and other reasons given in the judgment just delivered, I think the appeal must be dismissed with costs.

B.D./D.S. *Appeal dismissed.*

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[1] Jatindra Mohan Tagore v. Ganendra Mohan Tagore, (1872) 9 Beng L R 377=18 W R 359 =I A Sup Vol 47=2 Suther 692=3 Sar 82 (P C).

[2] Lakshmi Chand v. Anandi, A I R 1926 P C 54=95 I C 566=53 I A 123=48 All 313 (P C).

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BROOMFIELD AND SEN, JJ.

Emperor

v.

R. J. Mistry—Accused.

Criminal Appeal No. 223 of 1936, Decided on 31st August 1936, from order of Presidency Magistrate, Fourth Court, Bombay.

(a) Factories Act (25 of 1934), Ss. 37, 39, 40, 42, 43, 44 and 60—R. 80 of rules made under S. 43 (2) (d)—Exemption under S. 37 does not carry with it exemption from provisions of Ss. 39 and 40—Work, in factory covered by exemption under S. 37, found to be going on between periods shown as periods

of rest—Provisions of S. 42 being infringed accused held guilty under S. 60 (b) (i).

Exemption from the provisions of S. 37 does not carry with it an exemption from the provisions of Ss. 39 and 40. The exemption as regards provisions of S. 37 cannot override the clear provisions of Ss. 39 and 40, and merely because a factory enjoys an exemption as regards S. 37 it cannot be presumed that it is not required to observe the provisions of Ss. 39 and 40. [P 55 C 1]

Where, therefore, in a dyeing, bleaching and printing factory, which was exempt from observation of intervals of rest required by S. 37, under R. 80 made under S. 43 (2) (d), it was found that work was actually going on during period shown as the period of rest in the notice of periods for work:

Held: that the clear provisions of S. 42 being infringed, the proprietor and manager of the factory were guilty of an offence punishable under S. 60 (b) (i). [P 55 C 1]

(b) Factories Act (25 of 1934), S. 43—Rules under S. 43—Exemptions existing under the rules must be specific—Section from provisions of which exemption is given must be clearly specified—Exemption cannot be inferred from other specified exemptions—It cannot override section not specifically included in such exemption.

Where exemptions as to special classes of persons or workers exist under the rules made by the local Government under S. 43, such exemptions have to be specific, and the sections from the provisions of which exemption is given have to be clearly specified in such rules. They cannot be inferentially deduced from other specified exemptions and a particular exemption cannot be allowed to override the provisions of a section not specifically included in such an exemption. [P 54 C 2]

P. B. Shingne—for the Crown.

H. R. Pardiwala and *Y. V. Bhandarkar*—for accused.

Sen, J.—This is an appeal by Government against the acquittal of the two accused persons who were charged under S. 60 (b) (i) read with S. 42 of Act 25 of 1934. Accused 1 is one of the proprietors, and accused 2 the manager, of the Swadeshi Dyeing, Bleaching and Printing Works. On 12th November 1935, Inspector Kagal visited this factory and found several men working therein at 9-30 p. m. The notice of the periods of work maintained for this factory under S. 39 of the Act showed that the working hours for the night shift were from 6 to 9 p. m. and again from 10 p. m. to 4 a. m. with an hour between 9 p. m. and 10 p. m. as the period of rest. The accused were accordingly prosecuted for breach of the provisions of S. 42 of the Act, which lays down that no adult worker shall be allowed to work otherwise than in accordance with the notice of periods for work for adults displayed under sub-s. (1), of S. 39 and the entries made beforehand against his name in the Register of Adult Workers maintained under S. 41. The part of S. 60 under which the accused were prosecuted runs as follows:

> If in any factory . . . . (b) any person is allowed to work in contravention (i) of any of the provisions of Ss. 34 to 38 inclusive, 42, 45 and 48 . . . . the manager and occupier of the factory shall each be punishable with fine which may extend to five hundred rupees.
>
> Provided that if both the manager and the occupier are convicted, the aggregate of the fines inflicted in respect of the same contravention shall not exceed this amount.

The term "occupier" has been defined in S. 2 of the Act as the person who has ultimate control over the affairs of the factory. The proprietor, accused 1, will under this definition be an occupier of the factory. The accused were acquitted by the Presidency Magistrate, Fourth Court, on the ground that this factory, being a dyeing, bleaching, and printing factory, came under the exemption provided by R. 80 made under S. 43 (2) (d) of the Act. Under that rule adult workers engaged in cloth printing, bleaching and dyeing factories or departments are exempted from the provisions of S. 37 of the Act. The learned Magistrate held that as the workers in this factory were exempted from the operation of S. 37, which provides for the fixation of intervals for rest, no rest hours were to be observed and that merely because the notice for periods of work mentioned a rest hour between 9 and 10 p. m. neither the manager nor the proprietor could be held liable for breach of S. 42. In his opinion, they would be liable for such breach only if it could be shown that they had contravened any of the provisions of Ss. 34, 35 and 36 of the Act. Those sections provide for the maximum weekly and daily hours for which workers in a factory can be allowed to work as well as for a weekly holiday. The learned counsel for the accused has argued before us that as the factory was exempted from the provisions of S. 37 of the Act, it should be held that it was also exempted from the provisions of Ss. 39 and 40 of the Act, which require that a notice for the periods of work should be displayed and maintained, being fixed beforehand in accordance with the provisions of Ss. 34 to 38, and that any proposed change in such period shall be notified to the Inspector in duplicate before the change is made. It is argued that none of the sections providing for the periods of rest and relating to notices of periods of work showing such periods of rest apply to the present factory owing to the exemption enjoyed by the factory as regards the fixing of the intervals of rest under S. 37. It seems to us that the learned Magistrate has wrongly applied the provisions relating to exemption under rules made under S. 43 of the Act. The relevant parts of this section are as follows :

> (2) The Local Government may make rules for adult workers providing for the exemption to such extent and subject to such conditions as may be prescribed in such rules ;
>
> (d) of workers engaged in any work which for technical reasons must be carried on continuously throughout the day—from the provisions of Ss. 34, 35, 36, 37 and 38.

There is no question that the present factory is covered by the exemption relating to cloth printing, bleaching, and dyeing, factories or departments ; but it will be observed that the exemption provided under R. 80 referred to above is with respect to S. 37 alone. Sub-s. (3), S. 43, states that :

> Rules made under sub-s. (2) providing for any exemption may also provide for any consequential exemption from the provisions of Ss. 39 and 40 which the Local Government may deem to be expedient, subject to such conditions as it may impose.

In the present case no consequential exemptions from the provisions of Ss. 39 and 40 have been made. Again S. 44 (1) is as follows :

> Where the Local Government is satisfied that, owing to the nature of the work carried on or to other circumstances, it is unreasonable to require that the periods of work of any adult workers in any factory or class of factories should be fixed beforehand, it may, by written order, relax or modify the provisions of Ss. 39 and 40 in respect of such workers to such extent and in such manner as it may think fit, and subject to such conditions as it may deem expedient to ensure control over periods of work.

In our opinion the fact that no relaxation or modification of the provisions of Ss. 39 and 40 has been made either under S. 44 or under S. 43 (3) shows that it is not intended that the exemption as regards the provisions of S. 37 should override the clear provisions of Ss. 39 and 40. The scheme of Part 1, Ch. 4 of the Act which relates to "restrictions on working hours of adults" seems to be that factories are to provide weekly and daily hours of work as provided in Ss. 34 and 36, a weekly holiday under S. 35, and intervals for rest under S. 37, and that they are required to display and correctly maintain a notice of the periods of work showing clearly the periods within which adult workers may be required to work. This notice of periods must remain operative until any change that may be felt necessary has been notified to the Inspector and thereafter the change made accordingly ; and while such notice remains operative, all adult workers are to work in accordance with the periods for work stated therein. In certain cases, under rules made by the Local Government under S. 43, there may be exemptions as to special classes of persons or workers ; but where such exemptions exist they have to be specific, and the sections from the provisions of which exemption is given have to be clearly specified in such rules. It does not seem intended that exemptions can be deduced inferentially from other specified exemptions or that a particular exemption should be allowed to override the provisions of a section not specifically included in such exemption. The accused certainly could have taken advantage of the exemption as regards S. 37 and either dispense with periods of rest (if Ss. 34 and 36 were not infringed thereby) or provide intervals of rest at variance with the requirements of that section. It does not seem to be their case that the intervals for rest were dispensed with.

The case as stated in their written statements is that as an experimental measure it was decided that the workmen working in the night shift should be allowed to leave the factory at 3 a. m., and that for the said concession the workmen undertook to take the benefit of the rest period in batches, viz., that all of them undertook to do the work between 9 and 10 p. m., it being arranged that they were to have their recess interval from 10 p. m., or at about that time in batches. Such an arrangement was clearly not in accordance with the periods of work and rest shown in the notice of periods maintained under S. 39. In our opinion, if the factory was to work under such an arrangement as stated above, it was the duty of the accused to get the notice of periods of work amended in the manner provided by S. 40 and then to bring such change into operation. The manner in which S. 43 (3) and S. 44 (1) are worded clearly shows that if it was intended to give factories of this description exemption as regards the requirements of Ss. 39 and 40, that would have been specifically shown by a rule or an order to that effect. It is, in our opinion, clearly impossible to infer, as the learned

Magistrate appears to have done, that because the factory enjoyed an exemption as regards S. 37, it must be presumed that it was not required to observe the provisions of Ss. 39 and 40, and that therefore there has been no infringement of S. 42 in this case. It is not denied that work was actually going on in a period shown as the period of rest in the notice of periods for work. That being so, there is no doubt, in our opinion, that the clear provisions of S. 42 were infringed and that an offence punishable under S. 60 (b) (i) of the Act was committed. The appeal must accordingly be allowed and each of the accused convicted. As regards the sentence, this appears to be the first case of its kind that has come to the notice of this Court, and the accused themselves might have been under some misapprehension, it seems to us, as to the interpretation of the different sections discussed above. We think that the ends of justice will be met by the infliction of a nominal sentence, and we accordingly sentence each of the accused to a fine of Rs. 15.

Broomfield, J.—I agree. That there has been a breach of the terms of S. 42 seems to me to be beyond dispute. That section says that no adult workers shall be allowed to work otherwise than in accordance with the notice of periods for work for adults displayed under sub-s. (1), S. 39. The notice displayed under that section showed the period 9 p. m. to 10 p. m., as a period of rest. When the Inspector went there at 9-30 p. m., he found several of the hands working. The defence substantially comes to this : that because this is a bleaching and dyeing factory and therefore exempt from the provisions of S. 37 of the Act under the rules made under S. 43 (2) (d), therefore it is also exempt from the provisions of Ss. 39 and 40. That is to say, the contention is that Ss. 39 and 40 only apply when S. 37 applies, but that is not so. There is nothing in the Act to show that exemption from the provisions of S. 37 carries with it an exemption from the provisions of Ss. 39 and 40. On the other hand sub-s. (3), S. 43 and S. 44 indicate that exemption from the provisions of S. 37 does not connote exemption from those other sections, since if that were so, S. 43 (3) and S. 44 would be superfluous. It is necessary that the provisions of the Act in this respect should be complied with, because if the working in the factory is not in accordance with the notified periods of work, Inspecting Officers would find it difficult to check the employment of the factory hands and ensure that they are not employed beyond their maximum period.

R.M./A.L. *Appeal allowed.*

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BROOMFIELD AND SEN, JJ.

Dagdu Govindset Wani—Complainant—Applicant.

v.

Punja Vedu Wani and *others*—Accused—Opponents.

Criminal Revn. No. 227 of 1936, Decided on 3rd September 1936, against order of First Class, Magistrate, Manmad.

(a) Criminal Trial—Meaning of 'trial' explained.

In the Bombay Presidency 'trial' has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case : *25 Cal 863* ; *A I R 1922 Lah 49* ; *A I R 1925 Lah 435* and *A I R 1934 Sind 106*, *Approved* ; *A I R 1915 Mad 23* and *A I R 1923 Mad 660*, *Dissent.* [P 56 C 1]

(b) Criminal Trial—Transfer of case—Charge framed in warrant case before transfer—De novo trial from beginning can be ordered.

Where a warrant case, after the framing of charge, is transferred from one Court to another it is open to the transferee Court to hear the case de novo and start from the beginning instead of recommencing the proceedings from the stage of charge. [P 55 C 2; P 56 C 2]

A. A. Adarkar—for Applicant.

K. B. Sukhtankar—for Opponents.

P. B. Shingne—for the Crown.

Broomfield, J.—The question in this case is as to the legality of an order under S. 250, Criminal P. C., for payment of compensation to the accused by the complainant on the ground that the complaint was false and vexatious. The illegality is alleged to consist in the fact that the Magistrate who made the order heard the case de novo and discharged the accused, although another Magistrate who first dealt with the case had framed a charge. This is said to be contrary to the terms of S. 350 of the Code. The argument of the learned advocate for the applicant is that in a warrant case—and this was a warrant case—the proceedings are only an inquiry until the charge is framed and the trial only commences after the charge. Therefore he says, if a charge has been framed and the trying Magistrate is succeeded by another Magistrate, the latter cannot recommence the proceedings from the beginning ; he can only re-commence the trial, i.e., re-commence the proceedings from the stage of the charge. For this proposition he relies on 38 Mad 585.[1] That was a case on S. 437 of the Code. The question before the Court was whether the District Magistrate had power to order further inquiry, which he can do only if there has been an order of discharge and not an order of acquittal. The Court held that if there has once been a charge framed there can be no order of discharge, but only an order of acquittal. That finding might be accepted without necessarily making any difference to the present case, since an order under S. 250 for compensation may be made as well after an order of acquittal as after an order of discharge. However, I do not suggest that 38 Mad 585[1] can be distinguished. There is no doubt that the Court did take the view that in a warrant case the trial only commences from the framing of the charge and that view has been taken in other Madras cases, e.g., 46 Mad 719.[2] But, according to my experience of the administration of criminal justice in this Presidency, which is not inconsiderable, the Courts here have always accepted the definition of trial which has been given in 25 Cal 863,[3] that is to say, "trial" has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case.

A different view from that taken in Madras has been taken by the Lahore High Court in 3 Lah 115,[4] where it has been held that for the purposes of S. 350 of the Code a trial cannot be said to commence only when a charge is framed. The trial covers the whole of the proceedings in a warrant case. This case was followed in 6 Lah 176[5] and the same view has been taken by the Judicial Commissioner's Court in Sind in 35 Cr L J 1261.[6] With all deference to the learned Judges of the Madras High Court we prefer the view which has been taken in these cases and hold that there is no substance in Mr. Adarkar's main contention.

He has also taken the point that the provisions of the second clause of S. 250 have not been complied with. That clause requires that the Magistrate shall record and consider any cause which the complainant may show against the order of compensation. It appears however that the Magistrate has sufficiently complied with the law. The complainant's statement has been recorded in his own words. The only reasons he gave were that his complaint was true and that the accused are related to each other. He also produced a written statement of his reasons. There is no ground for supposing that these reasons were not considered by the learned Magistrate whose judgment explains clearly why it was that he held the complaint to be false and vexatious. We think there is no substance in this contention nor in the further contention that the complaint cannot be said to be false because on the first hearing of the evidence two witnesses were found to support the complaint. The Magistrate's order was confirmed on appeal by the Sessions Judge. There are no legal grounds on which we feel called upon to interfere in revision. We discharge the rule.

B.D./D.S. *Rule discharged.*

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[1] Sriramulu v. Veerasalingam, A I R 1915 Mad 23=25 I C 1001=15 Cr L J 673=38 Mad 585.

[2] Ramanathan Chettiar v. Emperor, A I R 1923 Mad 660=71 I C 608=24 Cr L J 192=46 Mad 719.

[3] Gomer Sirda v. Queen-Empress, (1898) 25 Cal 863=2 C W N 465.

[4] Sahib Din v. Emperor, A I R 1922 Lah 49=66 I C 826=3 Lah 115=23 Cr L J 330.

[5] Fakhruddin v. Emperor, A I R 1925 Lah 435=95 I C 63=27 Cr L J 735=6 Lah 176.

[6] Labhsing v. Emperor, A I R 1934 Sind 106=1934 Cr C 831=151 I C 213=35 Cr L J 1261=28 S L R 239.

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BROOMFIELD AND WASSOODEW, JJ.

Keshavlal Harilal — Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 141 of 1936, Decided on 23rd July 1936, against order of Addl. Sess. Judge, Ahmedabad.

(a) Criminal P. C. (1898), Ss. 54 and 56 — Provisions of S. 54 are very wide and are not controlled by S. 56—Police constable is entitled to arrest person required under S. 54, independently of S. 56, without a warrant in cognizable case — Sub-Inspector of

Police, on complaint to him of cognizable offence, directing police constables present at time of complaint to bring offender — Police constables are justified in acting under their powers under S. 54 in arresting offender even though no written order was given to them by Sub-Inspector— Person preventing them from effecting arrest is guilty under S. 353, Penal Code.

The provisions of S. 54 are very wide and are not controlled by the provisions of S. 56 and a police constable is entitled to arrest, under S. 54, the person required, independently of S. 56, without a warrant, in a cognizable case. The word 'complaint' in Cl. 1, S. 54 does not admit of a restricted meaning that the complaint should be made to the arresting constables for action. The operation of S. 54 (1) cannot be restricted to cases where the Police Officer is acting entirely on his own initiative and without orders. [P 58 C 1, 2; P 59 C 2]

Where, therefore, a Sub-Inspector of Police, acting upon a complaint made to him of a cognizable offence, directs certain police constables, who are present when the complaint is made, to bring the offender to him, the latter are justified, even though no written order is given to them by the Sub-Inspector, in acting under their powers without a warrant under S. 54 (1) in effecting the arrest of the offender, on his refusal to submit to them, and a person preventing them from carrying out the arrest is guilty of an offence under S. 353, Penal Code. The constables are entitled to act independently on the complaint under the powers vested in them under S. 54 notwithstanding the fact that they are informally ordered to effect the arrest and it is immaterial whether they are conscious at the time of the arrest of the specific provisions of the Code to which their acts are referable: *A I R 1926 Pat 424* and *A I R 1918 Mad 514, Rel. on*; *A I R 1936 Rang 119, Dissent.*; *A I R 1917 Cal 253* and *A I R 1935 Cal 122, Disting.* [P 59 C 2]

(b) Criminal P. C. (1898), S. 56—S. 56 is not superfluous—It applies to subordinates other than Police Officers—It may also apply to Police Officers who cannot act under S. 54, for want of credible information or reasonable suspicion.

(Per *Broomfield, J.*)—S. 56 is not superfluous. It applies to subordinates other than Police Officers, for instance, chaukidars. It may be applicable also in cases where it is necessary to give orders to Police Officers, who cannot act under S. 54, not having the requisite knowledge as to the existence of credible information or reasonable suspicion. [P 60 C 1, 2]

J. C. Shah—for Accused.

P. B. Shingne—for the Crown.

Wassoodew, J.—The petitioner Keshavlal Harilal was convicted by the First Class Magistrate of Dhandhuka of the offence under S. 353, I. P. C., in that he assaulted and used criminal force to certain police constables whilst they were arresting in the discharge of their duty a cartman, who was charged with driving his cart in a rash and negligent manner and had caused hurt thereby to a child. The petitioner was sentenced to pay a fine of Rs. 150. He appealed to the Court of Session, and the learned Additional Sessions Judge, who heard that appeal, confirmed the conviction and sentence, holding that the police constables in question were lawfully discharging their duty as public servants at the material time.

It is clear from the record that a Mahomedan child aged three years was injured by a cart on a public road, and on that account was taken to the dispensary. The Police Sub-Inspector, who had got information about that occurrence, went to the dispensary, and whilst recording the complaint of the child's father, one Sardarmia interposed and informed the Sub-Inspector that the cartman concerned in the offence had refused to stop his cart when told to do so. Thereupon the Police Sub-Inspector ordered two of his police constables to go and bring the cartman to him. According to the evidence of one of the constables, when the cartman refused to stop his cart, they attempted to effect his arrest, and whilst so doing, the accused, Keshavlal, intervened and told the cartman to proceed, and not to submit to the orders of the policemen. It was alleged that Keshavlal physically prevented the policemen from taking the cartman with them, and that this resulted in a scuffle in which both parties received injuries. Upon those facts, the Magistrate held that the policemen were acting legally in effecting arrest, and that the act of Keshavlal was tantamount to preventing them from discharging their duty. It is argued that inasmuch as the police constables were acting under the authority of the order of their superior officer under S. 56, Criminal P. C., their act in apprehending or seizing the cartman,—whether he was directly responsible for the alleged rash act or not,—was illegal, there being no written order of the superior officer as required by that section. That section provides:

> When any officer in charge of a police station or any Police Officer making an investigation under Ch. 14 requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made.

It is common ground that no such order in writing was given to the Police Officers deputed to bring the cartman to the Sub-Inspector in the dispensary. The question is whether on that account the action of the Police Officers was necessarily illegal justifying the petitioner in preventing them from carrying out the arrest of the cartman. The argument of the learned advocate is that although the offence complained of against the cartman was a cognizable offence, the Police Officers could not act under S. 54 in the matter of his arrest, as the provisions of that section do not give them an unqualified power of arrest and are controlled by the provisions of S. 56 of the Code. We were referred to 13 Rang 754[1] as authority for that proposition. That was a decision of a single Judge, who was constrained to observe that there was no previous decision bearing on the subject, except (1869) 11 W R Cr 20[2] when he expressed the view that the provisions of S. 54 were limited by those of S. 56, Criminal P. C. In that case the investigating officer had given verbal orders to the arresting constable, and not an order in writing, to arrest a person, who was wanted on a report of theft made against him. The question arose whether the arrest made of the wanted man by the police constable was in order. Mosely, J. held that inasmuch as S. 56 (1) required that when any officer in charge of a police station intended that any officer subordinate to him should arrest any person, who may lawfully be arrested, he should deliver to the officer required to make that arrest an order in writing, and that as the police officer was acting under S. 56 of the Code, which limited the provisions of S. 54, the arrest was not in order. With extreme respect, no good reasons seem to have been given for restricting the operation of S. 54.

There is an authority bearing directly on the point, which was decided in 1926, namely, 5 Pat 533,[3] and which was available when 13 Rang 754[1] was decided but was not cited before Mosely, J. In that case three persons were charged before the police with theft of a bullock. The Sub-Inspector directed a constable to arrest the accused persons. The constable, without explaining the substance of the order as required by S. 56, arrested one of them. The offenders interfered and assaulted the constable, and rescued the person arrested. They were convicted under S. 147, I. P. C. The contention in that case was that as the provisions of S. 56, which required the officer effecting arrest to notify to the person arrested the substance of the order, were not complied with, the conviction was illegal. That part of the judgment which deals with the effect of the failure to comply with the provisions of Cl. (1), S. 56 in regard to the notification of the order to the person concerned, has no direct bearing on the question before us. But the Court also considered the argument for the Crown that independently of S. 56 a constable was entitled to arrest under S. 54 the person required. In dealing with that aspect of the case, the judgment proceeds thus (p. 535):

> The terms of S. 54 are very wide and authorize any Police Officer without an order from a Magistrate and without a warrant to arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. . . .
>
> It was contended on behalf of the petitioners that S. 56 lays down the procedure to be followed in the cases to which it applies and that that procedure has not been followed in the present case; and that the section applies to constables equally with chaukidars. But the fact that S. 56 applies to constables does not deprive them of their statutory powers conferred independently of that section.

There can be no doubt in the present case that there was a complaint before the Police Sub-Inspector of a cognizable offence. The Sub-Inspector apparently acting upon that complaint had directed his subordinate Police Officers to bring the cartman to him. Presumably, the effect of that order was that if the cartman did not submit, he should be brought under arrest. It seems to me that whether that cartman was guilty of an offence under S. 338, I. P. C., is of no consequence. What is of consequence is that the complaint had been made, and the Sub-Inspector had ordered the cartman's arrest. If therefore the police constables, being present, according to the evidence, when the complaint was actually made to the Sub-Inspector, were cognizant of the circumstances, it seems clear that they were justified in acting under their powers without a warrant under S. 54 (1) when effecting the arrest of the cartman. There is no force in the argument that the provisions of S. 56 would be rendered nugatory if they did not control the power of the police constables to act independently in the mat-

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1. Mohamed Ismail v. Emperor, A I R 1936 Rang 119=1936 Cr C 194=161 I C 459=37 Cr L J 463=13 Rang 754.
2. Queen v. Sheik Emoo, (1869) 11 W R Cr 20.
3. Kishun Mandar v. Emperor, A I R 1926 Pat 424=98 I C 254=27 Cr L J 1310=5 Pat 533.

ter of arrest. Perhaps that argument was founded upon the observation in 44 Cal 76,[4] referred to in 62 Cal 399,[5] to the effect that it is apparent from the terms of S. 54 that it was intended to cover those cases where the Police Officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the police officer has considered for himself, and that where the arrest is made in pursuance of an order of a Magistrate, it is that order which must determine the legality or otherwise of the arrest. With extreme respect the qualifying meaning is not apparent from the terms of S. 54 nor is it apparent that S. 56 in any way limits the statutory powers of a police constable to arrest without a warrant in a cognizable case.

In 62 Cal 399,[5] the Court was dealing with the question of the legality of an arrest under Cl. (7) of S. 54 by reference to the provisions as to arrest under the Indian Extradition Act. There is in fact no analogy in the reasoning which influenced the conclusion in that case which could serve as a guide. Here we are dealing with a complaint made to the superior officer of a cognizable offence and not directly to the subordinate officers, and the question is whether the latter could act independently upon that complaint under the powers vested in them under S. 54, notwithstanding the fact that they were informally ordered to effect the arrest. I am prepared to concede that where two police officers of superior and inferior rank have heard a complaint of a cognizable crime, and they choose to act independently, there is a likelihood of their actions overlapping. But there is no reason why a limitation should be imposed on the power of the police officer to arrest a person when the plain language of the section does not justify it. There is no reason to disbelieve the testimony of the police constable read over to us that, although in the initial stage they were merely concerned in procuring the appearance of the cartman before the Sub-Inspector, having regard to the change of circumstances they were constrained to use force in effecting arrest. It cannot be said that by reason of their superior's orders the constables were deprived of the initiative to act within their own powers under S. 54. The word 'complaint' in the first clause of that section does not admit of a restricted meaning that the complaint should be made to the arresting constables for action. And, in my opinion, it is immaterial whether the police constables were then conscious of the specific provisions of the Code to which their acts were referable. I am satisfied that the act of the police officers was legal, and, therefore, the interference on the part of the petitioner constituted an offence under S. 353, I. P. C. Accordingly, he was rightly convicted. We, therefore, discharge the rule.

Broomfield, J.—The only point of substance in this application is whether the two constables had lawful authority to arrest a cartman alleged to have run over a child. They were ordered by their superior officer to go and arrest the man or bring him to the police-station. They were not given any written order. The learned counsel for the applicant says that in the absence of such an order, which is required by S. 56, Criminal P. C., the attempt to arrest was not legal, and the applicant was justified in obstructing the constables. The view taken by the lower Courts is that the constables had power to arrest under S. 54 of the Code. In my opinion, this is right. It seems to me to be in accordance with the plain language of S. 54, Cl. (1), which says that any police officer may, without a warrant, arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. The cartman was concerned in a cognizable offence, a reasonable complaint had been made against him and this was so to the knowledge of the constables, who were present when the complaint was made. I cannot see any reason why the operation of this provision should be restricted, as suggested by the learned counsel, to cases where the police officer is acting entirely on his own initiative and without orders. In 13 Rang 754,[1] it was held by Mosely, J. as follows (p. 756):

> . . . where a subordinate Police Officer is not acting independently, but is merely deputed by a superior officer to arrest someone concerned in a

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[4] *In re* Charu Chandra Mazumdar, A I R 1917 Cal 253=37 I C 57=18 Cr L J 73=44 Cal 76 =20 C W N 1233.

[5] Santabir Lama v. Emperor, A I R 1935 Cal 122=1935 Cr C 156=155 I C 537=36 Cr L J 794=39 C W N 285=62 Cal 399.

cognizable offence, a further formality is prescribed, presumably to prevent abuse of the powers of the police, or to allow the person arrested to know the reason for his arrest and the office of the person arresting him. The provisions of S. 54 are limited by those of S. 56, Criminal P. C.

This is a decision of a single Judge, and with deference I do not agree with it. In 62 Cal 399,[5] it is observed as follows (p. 402):

> Section 54 is intended to cover those cases where the Police Officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the Police Officer has considered for himself. This was pointed out by Chaudhari, J. in 44 Cal 76,[4] and indeed it is apparent from the terms of S. 54 itself. On the other hand, where the arrest is made in pursuance of an order of a Magistrate, it is that order which must determine the legality or otherwise of the arrest.

No reasons are given in the judgment for these conclusions. 44 Cal 76,[4] which is referred to, was a case on rather a different point. It was not a case where there was any order of a Magistrate or superior police officer to arrest. A police officer there took action on the strength of a letter received from an officer in the C. I. D. in another province stating that he had information upon which he thought there was prima facie evidence. With reference to those facts it was held that "reasonable suspicion" or "credible information" upon which an arrest could be made by a police officer under S. 54 must be based upon definite facts and materials placed before him which the officer must consider for himself before he could take any action under that section. I doubt whether this case can be regarded as an authority for holding that a police officer cannot act under S. 54 if a regular complaint has been made to his personal knowledge. Here, as I have mentioned, the two constables were present when the complaint was made. 5 Pat 533,[3] which my learned brother has discussed, is a clear authority for the view that S. 54 is not controlled by S. 56, and with respect I think that that is the proper view. I may refer also to 40 Mad 1028.[6] It has been argued that this view makes S. 56 superfluous. But I do not think so. No doubt there may be some overlapping. But S. 56 is not superfluous. It applies to subordinates other than police officers, for instance chaukidars; and, moreover, there may be cases where it is necessary to give orders to police officers who could not act under S. 54 not having the requisite knowledge as to the existence of credible information or reasonable suspicion. For these reasons I agree that the rule should be discharged.

R.M./A.L. *Rule discharged.*

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BEAUMONT, C. J. AND WASSOODEW, J.

Emperor

v.

Mahomed Adam Chohan—Accused.

Criminal Ref. No. 93 of 1936, Decided on 28th August 1936, from Sess. Judge, Surat.

(a) Criminal Trial—Reference under S. 307, Criminal P. C.—Jury finding accused guilty under S. 326, Penal Code—Court holding offence under S. 304, Penal Code—Power of Court having power to pass sentence provided under S. 304, under S. 326—Difference between Judge and Jury being purely of academic nature, reference should not be made.

Where an accused in a Sessions case is found guilty by the jury under S. 326 and the Court thinks that conviction should be under S. 304, Penal Code, as the Court has power under S. 326 to impose a sentence of transportation for life or rigorous imprisonment for ten years, the question whether accused ought to be convicted under S. 326 or S. 304 is in the nature of an academic one, and hardly worth a reference under S. 307, Criminal P. C. [P 61 C 1, 2]

(b) Criminal Trial—Charge to jury—Intention to cause death and actual death proved—Charge should be of culpable homicide amounting to murder—Jury to determine exceptions under S. 300, Penal Code,—Judge should not prejudge nature of offence.

Where there is a common intention to cause death, and death is caused, the charge should be culpable homicide amounting to murder under S. 302. It is for the jury to determine whether the case falls under one of the exceptions to S. 300, so as to reduce the offence from one of murder to one of culpable homicide not amounting to murder. The Judge ought not to prejudge the question in framing the charge of culpable homicide not amounting to murder. [P 61 C 2]

(c) Criminal Trial—Statements made by witnesses to police during investigation—Statements, how should be used—Provisions of S. 162, Criminal P. C., explained.

Statements made to the police can only be put to the witnesses under S. 162, Criminal P. C.; though in good many cases Sessions Courts do not follow the procedure laid down by the section. The section provides that in all cases, not falling under S. 32, Cl. (1), Evidence Act, no statement, whether oral or written, made by any person to a police-officer in the course of an investigation, may be used for any purpose at an inquiry or trial in respect of any offence under investigation at the time when such statement was made. That is the general provision contained in the first paragraph of S. 162. The first proviso makes an exception which is strictly limited in its application. To bring the provisions of the proviso into operation, three conditions must be fulfilled: first the statement of the witness in question must have been reduced into writing; secondly, the witnesses must have been called for the prosecution; and thirdly, the written statement must be proved. When those conditions exist, the proviso directs that "the Court shall, on the request of the accused refer to such writing, and direct that the accused be furnished with a copy thereof," and then it can be used to contradict the witness. In actual practice, when the first two conditions are fulfilled, the written record of the witness's statement is generally put to him on an undertaking of the prosecution to call the investigating officer to prove the statement, because it is inconvenient to prove each statement separately. So that the general practice is to call the investigating officer at a later stage of the trial, and he proves the written statements which have been put to the witnesses. [P 61 C 2; P 62 C 1]

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[6] **Ratna Mudali v. Emperor, A I R 1918 Mad 514=40 I C 709=18 Cr L J 709=40 Mad 1028.**

(d) Criminal Trial—Jury—Misdirection—Police alleged to have tampered with statements of witnesses made to them—Jury to determine allegations—Telling of facts by Judge and his opinion on allegation amounts to misdirection.

The prosecution case was that the Sub-Inspector of Police had deliberately tampered with the statements of witnesses because he was actuated by a desire to save one of the accused from any prosecution, and in furtherance of that desire had not recorded correctly the statements made to him by the persons whom he was examining as prosecution witnesses:

Held: it was essentially a matter for the jury to consider whether that was the correct view of the matter or not, and where instead of leaving that question to the jury, the Judge told them in the most emphatic terms that the conduct of the Sub-Inspector of Police had been rather surprising and antagonistic to the prosecution case, and therefore it was not safe to place much reliance on the statements taken down by him, such statements of the Judge amounted to misdirection. The Judge should not have told the jury what the facts were; he should have left the question to them. [P 62 C 1, 2]

(e) Criminal P. C. (1898), S. 307—High Court can order retrial.

High Court has power on a reference under S. 307, Criminal P. C., to direct a re-trial, though there are some difficulties arising from the language in which S. 307 is expressed: *A I R 1935 Cal 184 (F B), Foll.* [P 62 C 2]

G. C. O'Gorman and *B. G. Thakor*—for the Accused.

B. G. Rao—for the Crown.

Beaumont, C. J.—This is a reference by the Sessions Judge of Surat under S. 307, Criminal P. C. The trial was by a jury, and the jury convicted accused 1 under S. 326, I. P. C., and they acquitted accused 2 and 3. With regard to accused 1, the learned Judge thinks that he should have been convicted under S. 304, Part 1, I. P. C., but inasmuch as the Court has power under S. 326 to impose a sentence of transportation for life or rigorous imprisonment for ten years, it seems to me that the question whether accused 1 ought to be convicted under S. 326 or S. 304 is in the nature of an academic one, and hardly worth a reference under S. 307, Criminal P. C.

In the case of accused 2 and 3, the learned Judge thinks that the verdict was perverse, and has referred the matter to us on that ground. Unfortunately, there have been a good many irregularities in the course of the trial. In the first place, the charge itself is plainly wrong. The accused are charged, in furtherance of common intention to do one Kasam to death, with having caused his death, and thereby committed culpable homicide not amounting to murder. It is quite plain that if there was a common intention to cause death, and death was caused, the charge should be culpable homicide amounting to murder under S. 302. It is for the jury to determine whether the case falls under one of the exceptions to S. 300, so as to reduce the offence from one of murder to one of culpable homicide not amounting to murder. The learned Judge ought not to have prejudged the question in framing the charge.

The prosecution case was that the man Kasam was killed on 8th August 1935, in a maramari which took place at a gambling house; and a considerable number of eyewitnesses were called to speak as to the circumstances in which Kasam met his death. If their evidence be accepted, then there is certainly a very strong cause against accused 1, and a good deal to be said against the other two accused. In the cross-examination of the witnesses, it was suggested to them that in their statements made before the Fauzdar, the investigating officer, they had admitted that they had in fact not seen anything of the offence, and they were not eyewitnesses at all. That was the general line of cross-examination. Now, statements of that sort can only be put to the witnesses under S. 162, Criminal P. C.; and I have noticed in a good many cases that Sessions Courts do not follow the procedure laid down by the section. The section provides that in all cases—not falling under S. 32, Cl. (1), Evidence Act—no statement, whether oral or written, made by any person to a police-officer in the course of an investigation, may be used for any purpose at an inquiry or trial in respect of any offence under investigation at the time when such statement was made. That is the general provision contained in para. 1 of S. 162. The first proviso makes an exception which is strictly limited in its application. To bring the provisions of the proviso into operation, three conditions must be fulfilled; first, the statement of the witness in question must have been reduced into writing; secondly, the witnesses must have been called for the prosecution; and thirdly, the written statement must be proved.

When those conditions exist, the proviso directs that "the Court shall, on the request of the accused, refer to such writing, and direct that the accused be furnished with a copy thereof," and then it can be used to contradict the witness. In actual practice, when the first two conditions are fulfilled, the written record of the witness' statement is generally put to him on an undertaking of the prosecution to call the investigating officer to prove the statement, because it is inconvenient to prove each statement separately. So that, the general practice is to call the investigating officer at a later stage of the trial and he proves the written statements which have been put to the witnesses. In the present case, that procedure was ignored. The witnesses were cross-examined as to the statements,—apparently oral statements, which they had made to the investigating officer,—although oral statements to the police can never be used for any purpose. When the Fouzdar was called, he stated that the witnesses had made statements to him of the nature put to them in cross-examination; and towards the end of his evidence, he said that he had referred to a written record of the statements in order to refresh his memory. But the written statements were never put in, and were never proved; and inasmuch as the witnesses were alleging that they had not made the statements alleged, and that such statements as they had made had been wilfully altered by the Fouzdar, it was more than ever necessary in this case that the actual written statements should have been put in.

There is, however, a serious misdirection in the summing-up of the learned Judge. It appears that the prosecution case was that the Fouzdar had deliberately tampered with the statements of witnesses, that he had been actuated by a desire to save accused 3 from any prosecution, and in furtherance of that desire had not recorded correctly the statements made to him by the persons whom he was examining. Now it was essentially a matter for the jury to consider whether that was the correct view of the matter or not. They had to consider whether they would believe the alleged eyewitnesses that they had never told the Fouzdar that they were not eyewitnesses, or whether they would believe the Fouzdar in his statement that the witnesses had told him that they were not eyewitnesses, in which case of course, the jury could not have accepted the evidence of the witnesses as to what took place. Instead of leaving that question to the jury, the learned Judge told them in the most emphatic terms that the conduct of the Fouzdar had been rather surprising and antagonistic to the prosecution case, and therefore it was not safe to place much reliance on the statements taken down by him. The learned Judge should not have told the jury what the facts were; he should have left the question to them.

Having regard to these serious irregularities, it appears to me quite impossible in this case that we should convict any of the accused; and the only question which we have to consider is whether we should direct a re-trial. A Full Bench of the Calcutta High Court in 62 Cal 572[1] have held that the High Court has power on a reference under S. 307, Criminal P. C., to direct a re-trial, though, as the Court points out, there are some difficulties arising from the language in which S. 307 is expressed. I think the view of the Full Bench of the Calcutta High Court is right, and that we have power in a case of this sort to direct a re-trial. The case was a serious one, in which a man was undoubtedly done to death. I think, therefore, that we ought to send the matter back to be re-tried. In some respects it would have been better to send the case for re-trial to another Court; but there are practical difficulties in the way, because the accused are entitled to have a trial by jury, and there is no other Sessions Court in which trials take place by jury, and which is conveniently situated for the purpose of the present trial. I think, therefore, that the only order we can properly make is to set aside the verdict of the jury as regards all the three accused, and send the case back to the Sessions Judge at Surat to be re-tried according to law.

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[1] Emperor v. Rafiqu-ud-din Ahmad, A I R 1935 Cal 184=1935 Cr C 24=155 I C 687=36 Cr L J 808=62 Cal 572=39 C W N 368 (F B).

Wassoodew, J.—I agree.

B.D./D.S. *Order accordingly.*

A. I. R. 1937 Bombay 63

BEAUMONT, C. J. AND RANGNEKAR, J.

In re *Bai Rukhiabai,*

O. C. J. Appeal No. 40 of 1936, and Misc. No. 74 of 1936, Decided on 30th September 1936.

(a) Religious Endowment—Trustee—Application by trustee to sell trust property — Procedure — Advocate-General represents charity— Advocate-General should be moved as he represents all beneficiaries—Beneficiaries not to be allowed to appear and argue case—Costs not to be awarded to beneficiaries out of charitable estate — Beneficiaries having conflicting interest may be allowed to appear when Advocate-General cannot represent all of them.

The general practice is that Advocate-General represents charity. If there is an application by the trustees for a charity for leave to take a particular course, it is sufficient to serve that application on the Advocate-General, who represents all the beneficiaries and the Courts should be slow to allow any of the beneficiaries to come before the Court and argue the case themselves and even more slow to allow their costs to be paid out of the charitable estate. That course may be necessary where, for instance, there is a conflict between various beneficiaries and the Advocate-General feels that he cannot represent all parties. [P 63 C 2]

(b) Religious Endowment—Trustee—Alienation by—Beneficiary allowed simply to appear and argue not as party respondent—Advocate-General representing all beneficiaries—Beneficiary has no right of appeal.

When a beneficiary is allowed not as party respondent but simply to appear and to be heard although the Advocate-General is present to represent all the beneficiaries, beneficiary has no right of appeal. It is wrong for the Court to encourage appeals by beneficiary of charitable funds when Advocate-General is before the Court and can appeal if he thinks proper. [P 64 C 1]

M. C. Setalvad—for Appellant.

Jamshed Kanga, and *K. S. Shavaksha* —for Respondent 1.

K. McI. Kemp, in person.

F. J. Coltman and *M. A. Somji* — for Respondent 3.

Beaumont, C. J.—This is an appeal by ten persons, who are described as being some of the members of the managing committee of the Cutchi Memon Jamat having their office at Kambekar Street without the Fort of Bombay, and a preliminary objection is taken that they have no right of appeal. The matter originated with a petition by a trustee of a charity created under the will of Abdulla Haji Dawood Bawla in respect of a property situated at Mahim and known as Abdulla Haji Dawood Bawla Sanatorium. According to the petition the trusts of the Sanatorium were for the Cutchi Memon community. The trusts are not confined to the members of that community in any particular locality but extend to the whole community. The petition asks that the Sanatorium may be sold and the proceeds of the sale applied under the directions of the Court. The matter originally came before Kania, J. who made an order for sale, but subsequently some technical difficulty arose and the petition came on again for hearing before B. J. Wadia, J. On the hearing the learned Judge made these observations, which are pertinent to the present preliminary objection :

> In my opinion notice should have been given to the beneficiaries directly before the order was made, as certain correspondence had been previously carried on by them with the former Advocate-General. The beneficiaries however are now before the Court through Mr. Osman Sobani, a member of the managing committee of the Cutchi Memon Jamat, who stated that he was authorized by the committee to represent their views before the Court, and the matter was heard de novo before me on an application for a fresh order authorizing the sale.

The learned Judge directed the costs of Mr. Sobani to be paid as between attorney and client out of the funds of the charity. There may have been some special reason which induced the learned Judge to make the order which he did, but there can be no doubt about the general practice that the Advocate-General represents the charity. If there is an application by the trustees for a charity for leave to take a particular course, it is sufficient to serve that application on the Advocate-General, who represents all the beneficiaries; and I think the Courts should be very slow to allow any of the beneficiaries to come before the Court and argue the case themselves, and even more slow to allow their costs to be paid out of the charitable estate. Of course, sometimes that course may be necessary, where, for instance, there is a conflict between various beneficiaries and the Advocate-General feels that he cannot represent all parties. But there appears to have been nothing of that sort in this case, and I think the learned

Judge was probably wrong in allowing these beneficiaries to appear on this petition. However the question is whether, having regard to the directions given by the learned Judge, the opponents have any right of appeal. In my opinion, the course adopted by the learned Judge really came to no more than this: that he was willing to hear Mr. Sobani on behalf of the managing committee of the Cutch Memon Jamat. He was willing to hear what he had to say in the matter; but I do not think that the learned Judge intended to make him a party respondent to the petition so as to give him any right of appeal against an order made on the petition. Moreover, the persons who are appealing in this case are ten persons, who are members of the community, and the resolution which has been passed by the members of the Cutchi Memon Jamat of Bombay, which represents only part of the community, authorizes those ten persons to appeal, and also to pay their costs out of the funds of the Jamat. One of the ten persons is Mr. Sobani, but the authority is not given to him to appeal though he is the only person who, it might be suggested, was a respondent to the petition. Apart from this technical point, I think the effect of the learned Judge's order was not to make Mr. Sobani or any member of the community a party respondent to the petition, so as to give him any right of appeal; and I think it would be wrong for this Court to encourage appeals by beneficiaries of charitable funds, when the Advocate-General is before the Court and can appeal if he thinks proper. In my opinion therefore on that ground the appeal should be dismissed with costs. Separate sets of costs. The trustees and the Advocate-General to have their attorney and client's costs, and any party and party costs not recovered from the appellants from the trust funds.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 64

BEAUMONT, C. J. AND RANGNEKAR, J.

Nemichand Uttamchand—Defendant—Appellant.

v.

Chaturbhuj Damji—Plaintiff—Respondent.

O. C. J. Appeal No. 48 of 1935 and Suit No. 61 of 1935, Decided on 16th September 1936.

(a) Limitation Act (1908), Ss. 12 (2) and 5—'Time requisite' means time properly required and not time taken unreasonably—Judgment appealed from delivered on 31st July — Decree-holder sending draft of order for appellant's approval on 2nd August—Decree-holder applying to Prothonotary for settling order on 16th August — Appellant doing nothing between 2nd and 16th August—Copy issued on 10th September and appeal filed on 28th September—Delay held unreasonable under S. 12 (2) but excusable under S. 5.

"The time requisite" does not mean time actually taken in obtaining a copy of the decree, but means the time properly required for such purpose, and does not include time taken unreasonably by the appellant. In applying S. 12 (2), the Court has to consider whether appellant has exercised reasonable and proper diligence in obtaining a copy of the order. [P 65 C 1]

A certain judgment was delivered on 31st July. The decree-holder sent a draft of the order to the appellant for approval on 2nd August. The appellant did not approve the draft and on the 15th August the decree-holder sent a reminder to the appellant. On the 16th the decree-holder applied to the Prothonotary to fix an appointment for settling the order. On 26th August there was an appointment and the order was settled. The copy of order was actually issued on 10th September and the appeal was filed on 28th September :

Held : that the delay was unreasonable under S. 12 (2). According to the practice of the Bombay High Court the delay was however excusable under S. 5 though in future it would not be excused : *A I R 1922 P C 352, Foll.* [P 64 C 2; P 65 C 1]

(b) Limitation Act (1908), Art. 151—Date of decree is date on which judgment is pronounced and not the date on which decree is settled.

According to the practice of the Bombay High Court the date of the decree is the date on which judgment is pronounced and not the date on which the decree is settled. [P 65 C 1]

Jamshed Kanga, J. S. Khergamvala and *K. S. Shavakshah*—for Appellant.

K. M. Munshi and *R. J. Kolah*—for Respondent.

Beaumont, C. J.—In this appeal a preliminary objection is taken that the appeal is out of time. The relevant dates are that the judgment appealed from was given on 31st July 1935, and the present appellant applied on the same day to the Prothonotary for a certified copy of the order. On 2nd August the respondent, in whose favour the order had been made, sent a draft of the order to the appellant for approval. The appellant did not approve the draft, and on 15th August the respondent sent a reminder to the appellant. On the 16th the respondent applied under R. 268 of the High Court Rules to the Prothonotary to fix an appointment for settling the order. On 26th August there was an appointment by the

Prothonotary, at which the parties appeared, and the order was settled. The copy order was actually issued by the Prothonotary on 10th September, and the appeal was filed on 28th September. So that the time for appeal being 20 days, the appeal was filed in time if the starting point be the date on which the decree was finally settled. But the practice in this Court has always been to date the decree as on the day on which judgment is pronounced, and not on the day on which the decree is settled, and under Art. 151, Limitation Act, time runs from the date of the decree. It is, of course, clear that in cases where the order is complicated it might be impossible to draft a memorandum of appeal without having the formal order appealed from in front of counsel, and presumably to get over that difficulty it is provided in S. 12 (2), Limitation Act, that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the decree appealed from shall be excluded. It has, I think, generally been the practice in this Court to assume that under that section there is excluded the whole period taken in obtaining a copy of the decree. But it is necessary to point out that according to the ruling of the Privy Council in 49 I A 307,[1] "the time requisite" does not mean the time actually taken in obtaining a copy of the decree, but means the time properly required for such purpose, and does not include time taken unreasonably by the appellant.

In applying S. 12 (2) the Court has to consider whether the appellant has exercised reasonable and proper diligence in obtaining a copy of the order. In this case the appellant was certainly guilty of a certain amount of unnecessary delay. Between 2nd and 16th August he did nothing, and that period was wasted. His excuse is that his clients live at Dhulia, some distance from Bombay, and that he could not approve the order without their instructions, but the managing clerk, who has made an affidavit, does not say that the copy of the draft was sent to the clients, or that any effort was made to obtain their instructions. However in view of the practice which has prevailed up to now, we think that the appellant had sufficient cause for the delay, and that we can therefore excuse it under S. 5, Limitation Act, and that course we propose to adopt. But now that the point has been raised attorneys must not assume that the whole time actually occupied in procuring the copy of the decree to be appealed from will be allowed under S. 12 (2), or that in future we shall be prepared to excuse delay under S. 5.

Rangnekar, J.—I agree with the judgment just delivered on the first preliminary point. (The rest of the judgment is not material for purposes of this report.)

S.C./D.S. *Order accordingly.*

A. I. R. 1937 Bombay 65

BROOMFIELD AND TYABJI, JJ.

Bai Sakar and *another* — Plaintiffs — Appellants.

v.

Ismail Gafoor — Defendant — Respondent.

Second Appeal No. 254 of 1932, Decided on 4th February 1936, against decision of First Class Sub-Judge, Nadiad, in Appeal No. 98 of 1930.

(a) Custom—Essentials of validity—Nature and extent of proof—Custom to be valid in law must be ancient, certain and not opposed to public policy—Person asserting particular custom must plead it specifically and with certainty and prove it by clear and unambiguous evidence.

Custom must be ancient, certain and not opposed to public policy. Custom when relied upon as modifying the ordinary law of succession must be a custom well known and distinctly ascertained. It must be pleaded specifically and with certainty and proved as it is pleaded. It must be established to be ancient and invariable by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. If the party who relies on the custom is unable to define it, and leaves it to be deduced from evidence called to prove something quite different, the Court may well be suspicious as to whether there is such a degree of certainty about the custom that it is deserving of recognition by the Courts. The question of fact—whether the parties before the Court are bound by custom—must be determined by appropriate evidence in that very case. The evidence appropriate for establishing that the custom is binding on the particular parties must ultimately include proof of the fact that the parties before the Court have adopted it as a rule of conduct and have consciously accepted it as having the force of law; that the particular parties have been governing their conduct in accordance with the custom. Such a custom originates as a rule framed or at any rate followed by the parties (or their predecessors) for the conduct of daily life: the rule so framed grows up into a custom. Proof of this ultimate fact—that the parties have adopted the rule of conduct—may consist of adducing previous instances in which the particular parties themselves have followed the rule. Secondly, it may consist of instances concerning other persons belonging to the same community or group as the particular parties; in which case it is matter of inference that the particular parties would have acted in a similar way. To justify this inference, however, the link must necessarily be established that the particular parties and third parties whose conduct is actually proved stand on the same footing either by belonging to the same community or group, so that the inference of custom may be legitimately drawn: *A I R 1917 P C 181, Rel. on*; *Case law discussed.* [P 71 C 2; P 72 C 1, 2; P 73 C 2; P 74 C 1]

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[1] Pramatha Nath Roy v. Lee, A I R 1922 P C 352 = 68 I C 900 = 49 I A 307 = 49 Cal 999 (P C).

(b) Evidence Act (1872), Ss. 13, 32 (4), 40, 43, 41, 49 and 87 — Judgments not inter partes—Custom judicially recognized is presumed to be reasonable and not opposed to public policy—That particular custom though judicially recognized is applicable to particular parties before Court is a question of fact which requires to be proved by appropriate evidence — Previous judgments as to custom are mere documentary evidence and have not force of law—Court may take judicial notice of custom when continually put forward and proved by evidence.

The fact that a particular custom has been judicially recognized establishes that the custom is reasonable, and not opposed to public policy so that it will be upheld whenever it is proved. This is the legal aspect of the custom. But judicial recognition of a custom in another suit leaves untouched the proof of the fact that the custom is applicable to the particular parties who are before the Court. That is a question of fact to be established by the particular parties. The previous decrees and judgments recognizing a particular custom are mere documentary evidence and not binding as decisions having the force of law. The judgment may of course make the matter res judicata if all the requirements of S. 11, Civil P. C., are satisfied. On the other hand, the previous judgment may be merely evidence under Ss. 40, 41, 49, 87 and 32 (4) or similar sections of the Evidence Act; or the judgment may be admissible under the provisions of Ss. 13 and 43, Evidence Act, as only establishing a particular transaction in which the custom was asserted and recognized. Even in such cases the particular effect of the previous judgment or decision may by reason of the quantity and nature of the evidence then adduced be that third parties may not consider it worth their while to contest once more the applicability of the customary rule to themselves, although they were not strictly bound by the previous decision, and although the decision did not make the matter res judicata. Or the custom may have been continually put forward and proved by evidence, so that the time has come when a Judge may say that he no longer requires it to be proved, but that he will take judicial notice of it: *Moult* v. *Halliday* (*1898*) *1 Q B 125*; *George* v. *Davies*, (*1911*) *2 K B 445*; *A I R 1922 P C 59*; *A I R 1931 P C 89*; *8 Mad 464*; *14 M I A 377* (*P C*) and *A I R 1915 Mad 711, Rel. on.* [P 71 C 2; P 72 C 1, 2]

(c) Hindu Law—Applicability—Sunni Bohras of Borsad—Presumption—Presumption as to applicability of Hindu law extends only to law of inheritance and succession as applied to separate property — Application of coparcenary law is not to be presumed and must be proved.

Sunni Bohras of Borsad cannot be differentiated from Sunni Bohras of Gujarat or Cutchi Memons and Khojas in whose case the law is well settled. The presumption is that these converts to Islam are governed by Hindu law of inheritance and succession in strict sense, i. e., as applicable to the estate of a separated Hindu. This presumption, therefore, extends to Sunni Bohras also and application of co-parcenary law is not to be presumed and must be proved. [P 77 C 2]

A Sunni Bohra of Borsad in Gujarat died leaving behind him a son *I* by his first wife, a second wife *S* and a son *B* and a daughter *A* from her. *B* having died, *S* brought a suit against *I* for the recovery of the share of her son *B* in the property. It was admitted by the parties that Mahomedan law was not applicable to the parties, but it was contended by *I* that Hindu law as to survivorship applied and he became the full owner on the death of his brother. It was contended by *S* that Hindu law applicable to the estate of a separated Hindu applied and she was entitled to succeed to the share of her son *B* in preference to *I*:

Held: that *S* was entitled to her son's property under Hindu law of inheritance and succession, which applied to the parties and that *I* was not entitled to succeed to his brother's property by rule of survivorship under Hindu law as it was not proved that that rule was applicable to parties by any custom, nor was it proved that females were excluded from inheritance by males by virtue of any custom applicable to parties: *A I R 1923 Bom 148*; *A I R 1914 Bom 59* and *A I R 1915 Bom 151*, *Rel. on*; *12 B H C 281* and *9 Bom 115*, *Dissent.* [P 76 C 2; P 79 C 2]

M. R. Jayakar, *U. L. Shah* and *N. P. Desai*—for Appellants.

H. C. Coyajee and *N. N. Majumdar*—for Respondent.

Tyabji, J.—This appeal depends upon the system of law in accordance with which property owned by members of a Sunni Bohra family of Vallasan, in the Borsad taluka, must be deemed to have devolved on their deaths. The material facts are that one Gafoor Kasim, a Sunni Bohra of Vallasan, in the Borsad taluka, died in February 1922, at Petlad, leaving him surviving (1) a widow who was plaintiff 1 in the suit, and is now appellant 1; (2) a son by his first wife, defendant 1, the first and the only active respondent; and (3) a son by his second wife, viz., Ibrahim who was at the time of Gafoor Kasim's death eight years old and who died in June 1923, about 16 months after the death of his father; (4) a posthumous daughter, plaintiff 2, now appellant 2, who was born to Gafoor Kasim. Defendant 2 to the suit was a surety for the due administration of the estate. He was a formal party and his name has been struck off. He need not be referred to any further. I will, therefore, speak of defendant 1 as the defendant. Plaintiff 3 is a transferee of a moiety of the interest (if any) of plaintiffs 1 and 2. No special mention need be made of him either.

The substantial questions before us are: (1) Whether on the death of Gafoor Kasim his estate devolved upon (a) his heirs as determined by Mahomedan law, or (b) upon his two sons, as joint property in the sense in which that expression is understood in the law of joint Hindu families; and (2) whether subsequently on the death of Gafoor Kasim's infant son Ibrahim, (a) the infant's mother and full sister succeed him under Mahomedan law to the exclusion of his half brother, the defendant; or (b) (either because Ibrahim had no separate property, or for other reasons) the whole estate was subject to the law of survivorship applicable to the Hindu law of joint family property, and Ismail, defendant 1, became entitled thereto to the exclusion of the plaintiffs.

Besides these two alternatives—viz., (a) succession under Mahomedan law and (b) survivorship under the law of joint Hindu families—there was a third alternative, (c) that the parties were governed by the Hindu law applicable in the case of an intestate separated Hindu possessed of self-acquired property, and that in the first instance the infant Ibrahim succeeded under the law so applicable to half of his father's estate, and that thereafter his half devolved under the same law upon his mother as his sole heir. This third alternative is advanced in the plaint only by implication: in that it is stated that if the Court holds (what the plaintiffs do not admit) that the parties are governed by the Hindu law in matters of succession and inheritance, in that alternative, plaintiff 1 claims a half share. It is necessary to refer to the pleadings for determining the exact questions that were before the Court.

The plaint states the facts which I have narrated. Then it is claimed that plaintiffs 1 and 2 are entitled to their shares under the Mahomedan law—plaintiff 1 as the widow of Gafoor Kasim and the mother of Ibrahim, and plaintiff 2 as daughter and sister. Recitals follow of the defendant having obtained letters of administration to the estate of Gafoor Kasim, and having partially administered the estate, and of the defendant's statement (in his petition for obtaining the letters) that the parties were governed in the matter of succession and inheritance by the Hindu law. The plaintiffs do not admit the last, but in this context the alternative thirdly stated by me is put forward. In this Court the claim of the appellant-plaintiff 1 was based entirely on the applicability of the Hindu law of separated property—the third alternative as stated by me. It was not seriously pressed that the Mahomedan law applied: so that the first of the three alternatives stated by me is immaterial. In the written statement the plaintiffs' claim is stated not to be true (para. 1). It is denied that plaintiffs 1 and 2 acquired any right whatsoever (para. 7), but it is stated (para. 8) that plaintiff 1 is entitled to maintenance only, and that plaintiff 2 is entitled "up to the time she goes to her husband's place" to maintenance.

The grounds of the denial of the plaintiffs' claims are: that the parties were of the Sunni Bohra community of Gujarat and their ancestors were originally Hindus; that they were converted to Islam but they continued to be governed by Hindu law and usage as regards their property and in their mutual family rights and in other matters; that accordingly the rule of survivorship continued to be applied in the joint family and the rules of inheritance and succession appertaining to Hindu law were applicable to them (para. 3); that in accordance with the rule of survivorship agreeable to the well known usage followed in their community from time immemorial up to this day, they have been observing the right of inheritance over the property in their community; that therefore all the rules in respect of inheritance applicable to the Gujarati Sunni Bohra community in accordance with the law as well as usage, continued hitherto, as well as the rule of survivorship, etc., in the joint family according to Hindu law, were applicable to them; that notwithstanding that (fact), the plaintiffs had brought this suit to recover their share alleging that they were governed by the Mahomedan law, which is not admitted (para. 4); that the defendant, his brother Ibrahim, son of plaintiff 1, and the said Gafoor Kasim were living together, and that they all were members of a joint family, and that the whole property of the family was joint and undivided, and that the father of the defendant, the deceased Gafoor Kasim, was the manager of the property of the joint family (para. 5); that as the defendant's father Gafoor Kasim died in February of the year 1922, while they were joint, the defendant and his step-brother Ibrahim became owners of the property of the joint family by right of survivorship according to law and usage; and that Ibrahim having died without leaving any issue while the defendant and Ibrahim were living joint in estate, the defendant had become full owner of the property of the joint family according to law and usage (para. 6); that the defendant and plaintiffs 1 and 2 were living in union even after the death of the defendant's father and that they were governed in the matter of their property by the rule of inheritance of the Hindu law, and by the rules of the joint family.

There are other allegations in the plaint and written statement which are not at present relevant. On these allegations the only issue framed by the trial Court that is now material was issue 4. In its original form it stood as follows: "Whether the principal parties herein are governed by the Hindu law of joint families according to immemorial usage?" Two applications were made to the Court with reference to this issue on behalf of the defendant, and the words "as to the rule of survivorship and succession and inheritance" were ultimately introduced after the word "families" (Ex. 109). After this addition the issue stood thus:

> (4) Whether the principal parties herein are governed by the Hindu law of joint families as to the rule of survivorship and succession and inheritance according to immemorial usage?

So that the issue contained particulars of the Hindu law of joint families by which the parties were alleged to be governed according to immemorial usage; these particulars were put under two heads: first as to the rule of survivorship, and secondly, as to succession and inheritance. On this issue the finding of the trial Court was:

> They are governed by Hindu law of inheritance and succession; as between brothers, who have not divided their ancestral property, they are governed by the principle of survivorship obtaining in joint Hindu families.

In dealing with issue 4, the trial Court arrived at a preliminary conclusion, viz., that the Sunni Bohras of Dhandhuka and Kaira District must be taken to have been judicially declared to be governed by Hindu law in matters of inheritance and succession,—which proposition the learned counsel for the appellants stated that he would not controvert. On reaching this conclusion the learned trial Judge formulated (para. 27 of his judgment) the second question with which he considered he had to deal, viz., : "Who would take Ibrahim's share on his death in 1923,—his mother or his brother?" The answer, he proceeds, would depend upon the solution of the question whether the principle of survivorship applies: (a) if it applies, then on the father's death, the two sons (the defendant and the deceased Ibrahim) took the joint estate as coparceners, and on Ibrahim's death the defendant took the whole as survivor to the exclusion of the mother (plaintiff 1); (b) if, on the contrary the principle of survivorship does not apply, then the brothers were merely tenants-in-common and on the death of Ibrahim, his mother (plaintiff 1) would succeed according to the rules of Hindu law. There is a slight inaccuracy in assuming that the question arises only on the death of the infant Ibrahim. The question first arose in the lifetime of Gafoor Kasim whether the property was held by him jointly with his sons. The question again arose on his death, whether on his death the property was joint, having been such prior to his death; or having on his death become converted in the hands of his sons into joint property, held by coparceners in the sense understood in Hindu law, or whether it was held by them as tenants-in-common. This inaccuracy acquires consequence at a later stage when the evidence has to be considered. But for the present, it is enough to observe that the effective issue was recognized to be whether the defendant and the deceased Ibrahim held the estate as joint family property under the Hindu law with the incidents of survivorship, or whether it was held by the brothers as tenants-in-common. It was also stated that if the latter was the case, then according to the Hindu law the mother, plaintiff 1, would succeed and the property would not survive to his brother, the defendant. The learned trial Judge then refers to the argument on behalf of the defendant that once it is conceded that the Hindu law applies, the Hindu law of joint family with all incidents including survivorship must apply : paras. 28 and 29 of the judgment. But he holds, and in my opinion, his conclusion is right, that the custom must be strictly proved by the party alleging it, i. e., the defendant. The ground on which he arrived at the conclusion was that there had been no judicial recognition of the applicability of the rule of survivorship to members of a Bohra family. I shall refer to the effect of judicial recognition of custom later. The ruling of the trial Court may be taken to be that though the plaintiffs asserted that the Mahomedan law applied, they alternatively claimed on the basis that the Hindu law of separate property applied and were not prepared to contest the allegation that those rules of Hindu law applied ; that, on the other hand, there was some evidence adduced by the defendant on the applicability of those rules of Hindu law: that that evidence was hardly contradicted; that therefore he would assume that those rules of law applied. This view of the case was not controverted by the appellants. The decision before the trial Court therefore turned upon the question whether the defendant had discharged the burden of proving the allegations in his written statement which I have stated at length—shortly that the Hindu law of joint families and survivorship applied. For, the position was reached, as I have just stated, that if the defendant did not prove those allegations, the Hindu law applicable in the case of an intestate separated Hindu possessed of self-acquired property would be applied. It is convenient to speak of the defendant's allegation as an assertion of a custom, though, in view of the written statement, it would be more accurate to speak of an alleged election by the community to retain the Hindu law after conversion.

This inaccuracy is innocuous as there is no mode of proving this alleged election except by way of inference from actions and conduct that would establish custom : 45 Mad 308.[1] The learned trial Judge's findings on this issue are expressed in para. 44 (1): "Taken as a whole, the witnesses on both sides are unanimous as to the rule that sons exclude the daughters and widow of the deceased;" (2) then he proceeds with the cases where (a) there is ancestral property in the hands of brothers, and (b) when one of them dies before it is divided. In such cases he holds that the surviving brothers succeed to the exclusion of the daughters, widow and mother of the deceased brother. The learned Judge assumes that there must be some difference between the law applicable to ancestral and self-acquired property. But the parties being Muslims there was no warrant for the assumption. In any case though he is not prepared to lay down the general proposition that all the incidents of the Hindu joint family system apply to the parties, he does hold (para. 46) that in the case of ancestral estate which is not divided between brothers, the principle of survivorship applies, and that if one brother dies, the surviving brother takes the whole estate by survivorship in preference to the mother of the deceased. He considers it unnecessary to decide what is challenged even by the defendants' witnesses, viz., whether there is a vested right to claim partition during the father's life. Whether this particular incident of joint property had been adopted, he considered, he was not called upon to decide as there was no dispute about it. In his opinion what he calls the whole complex question whether all the incidents of the joint family system applied was not before him.

It was argued that this finding must be taken as a finding substantially in accordance with the allegations in the written statement. In my opinion that view is not correct: the incident of joint property which the learned trial Judge considered unnecessary to decide was an integral part of the allegations of the defendant. I shall develop my opinion at a later stage when I come to deal with the standard of proof in regard to the existence of custom in supersession of the general law. I proceed to consider the decision of the lower appellate Court. It framed for its own guidance six points for determination. Of these the first three alone are relevant. These with his answers are to this effect : (1) Whether the Sunni Bohras of Gujarat (plaintiffs being the same) are governed by the Hindu law of inheritance and succession? Answer: in the affirmative; (2) whether they are also governed by the Hindu law of survivorship, in case the brothers are living in union or by a special custom, under which the joint brother excludes the females, e. g., mother, daughter, widow? The answer is that they are not governed by the law of survivorship but by a special custom by which the joint brother excludes the females. (3) Whether the brothers who live in union take the inheritance, jointly or severally, i. e., as tenants-in-common or joint tenants? The answer is: "Tenants-in-common."

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[1] Muhammad Ibrahim Rowther v. Shaikh Ibrahim Rowther, A I R 1922 P C 59=67 I C 115=49 I A 119=45 Mad 308 (P C).

The respondent, who had obtained a confirmation of the dismissal of the suit by the lower appellate Court, on the basis of these findings, argued that these findings were entirely in accordance with the allegations in the written statement and that they justified the decree dismissing the plaintiff's suit. In my opinion the findings were materially different from the allegations in the written statement. The findings of the two Courts differ. The lower appellate Court altered the nature of the custom. A custom is held to have been proved which had never been alleged by the defendant. Reading the points for determination and the answers and comparing them with the allegations, there seems no doubt on the variance. The appellate Court distinctly divides the second point under two heads: the Hindu law of survivorship and a special custom under which a joint brother excludes the females, for instance, mother, daughter and widow. It is the second head, which, introduced for the first time, is entirely distinct from the first and which was never set up in the written statement.

There is no substance in the suggestion that the second head was intended merely to form a part of the general allegation of succession by survivorship, because—I have been at pains to point this out—the effective issue between the parties was unequivocally enunciated at an early stage of the proceedings. It was clearly understood by the parties. That issue was, whether the Hindu law being applicable, it was (a) the Hindu law applicable in the case of an intestate separated Hindu possessed of self-acquired property, or (b) the Hindu law governing joint family property, owned as coparcenary property by a Hindu joint family.

Nor does the judgment of the lower appellate Court leave any doubt on this point. The conclusion reached is that brothers—in this case Ibrahim and Ismail—do not take as joint tenants but as tenants-in-common. That was the one point for determination enunciated by the learned Judge himself: he finds definitely that brothers take not as joint tenants but as tenants-in-common. It was open to the respondent to say that the finding of the lower appellate Court on this point was erroneous, and to support the judgment on the basis that the finding should have been that the two brothers took as joint tenants governed by the law of survivorship. The learned and experienced counsel who appeared for the respondent did not take upon himself that task, but argued that the findings of the two Courts were in effect similar and in accordance with the allegations in the written statement. Ultimately, the question must turn into a question of the standard of proof required for establishing a custom such as is alleged in the present case; and I think I shall deal with the arguments placed before us best if I proceed immediately to consider the case from that aspect.

The nature and extent of proof required for establishing a custom has been frequently considered by their Lordships of the Privy Council. It was the principal point for consideration in 45 I A 10.[2] That appeal was from the Court of the Judicial Commissioner of Sind. The judgment was delivered by Lord Buckmaster. He lays down certain general principles to define the standard that the evidence must attain, in order to succeed in altering the devolution of property according to Muhammadan law, to a devolution determined by custom. In the very forefront Lord Buckmaster cites a passage from Robertson, J.'s judgment in 110 P R 1906,[3] with the remark that the words so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced. In this passage Robertson, J., lays down several propositions which for convenience I will state categorically:

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[2] Abdul Hussein Khan v. Bibi Sona Dero, A I R 1917 P C 181=43 I C 306=45 I A 10=45 Cal 450 (P C).

[3] Daya Ram v. Sohel Singh, (1906) 110 P R 1906=31 P L R 1907=59 P W R 1907 (F B).

(1) In all cases it lies upon the person asserting that he is ruled in regard to a particular matter by custom, (a) to prove that he is governed by custom and not by personal law, and (b) to prove what the particular custom is, which he seeks to apply; if he fails to prove the custom, S. 5, Cl. (b), Punjab Laws Act, applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause.

(2) There is no presumption created in favour of custom, even if the legislative enactment which governs the Court provides that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of the Government, and in the absence of Acts and Regulations the usage of the country in which the suit arose—on the contrary, it is only when the custom is established that it is to be the rule of decision.

(3) The Legislature (a) did not show itself enamoured of custom rather than law; nor (b) does it show any tendency to extend the "principles" of custom to any matter to which a rule of custom is not clearly proved to apply. (c) It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any custom applicable to the parties concerned which is not...'

(4) It is not sufficient to show that in regard to certain other matters the parties are governed by custom.

It seems to me that propositions (2) and (3) vindicate Beaman J.'s view in 38 Bom 449.[4] Prior to that decision, this Court, on the basis of the decisions commencing with the celebrated (1847) Perry's O C 110,[5] decided by Sir Erskine Perry in 1847, had got into the way of presuming that the whole of Hindu law was applicable to Khojas and Memons—and other communities were easily put on the same footing—and that the burden of proof must be thrown on any person belonging to such communities who denied any part of that proposition. That practice must, it seems to me, be attributable to notions similar to those controverted by Robertson, J. and disapproved by the Privy Council. After Beaman J.'s elaborate judgment, followed by Macleod, J. in 16 Bom L R 224[6] and by Shah, Ag. C. J. and Pratt, J. in 47 Bom 369,[7] the Courts do not presume that the Khojas and Memons in Bombay are governed by Hindu law except with reference to succession and inheritance, which are presumed to be governed by the Hindu law applicable to separate or self-acquired property.

I have put the first of Robertson J.'s propositions under two heads: (a) The assertion that a party is ruled in regard to a particular matter by custom must be proved; and (b) the particular custom must be proved. Involved with this latter question is however a third point, (c) which Robertson J., indicates in 3 (c): the custom must be ancient and certain and not opposed to public policy. The exact bearing of judicial decisions on the assertion and proof of custom is important, and in my opinion the judgments under appeal have misunderstood and misapplied the principles applicable. The fact that a particular custom has been judicially recognised establishes that the custom is reasonable and not opposed to public policy so that it will be upheld whenever it is proved. This is the legal aspect of the custom: (1898) 1 Q B 125.[8] But, subject to what I shall presently state, judicial recognition of a custom in another suit leaves untouched the proof of the fact that the custom is applicable to the particular parties who are before the Court. That is a question of fact to be established by the particular parties.

The question of fact—whether the parties before the Court are bound by the custom—must be determined by appropriate evidence in that very case. When it is alleged that a custom is binding upon a particular body of persons united by ties of religion, common descent, etc.—this distinguishes it from a local custom 51 I A 37[9], at p. 60—the evidence appropriate for establishing that the custom is binding on the particular parties must ultimately include proof of the fact that the parties before the Court have adopted it as a rule of conduct, have consciously accepted it as having the force of law; that the particular parties have been governing their conduct in accordance with the custom : 8 Mad 464[10] and 38 Mad 1052.[11] The matter must depend on an inquiry as to "what has been de facto the practice": 47 Bom 146.[12] As stated in *Hirbai* v. *Sonabai Khojahs and Memon's case*[5] such a custom originates as a rule framed or at any rate followed by the parties (or their predecessors) for the conduct of daily life: the rule so framed grows up into a custom. Proof of this ultimate fact—that the parties have adopted the rule of conduct—may consist of adducing previous instances in which the particular parties themselves have followed the rule. Secondly, it may consist of instances concerning other persons belonging to the same community or group as the particular parties, in which case it is matter of inference that the particular parties would have acted in a similar way.

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[4] Jan Mahomed v. Datu Jaffer, A I R 1914 Bom 59=22 I C 195=38 Bom 449=15 Bom L R 1044.

[5] Khojahs and Memons' Case: Hirbai v. Sonabai, (1847) Perry's O C 110.

[6] Mangaldas v. Abdul Razak, A I R 1914 Bom 17=23 I C 565=16 Bom L R 224.

[7] Haji Oosman v. Haroon Saleh Mahomed, A I R 1923 Bom 148=68 I C 862=47 Bom 369=24 Bom L R 978.

[8] Moult v. Halliday, (1898) 1 Q B 125=67 L J Q B 451=77 L T 794=46 W R 318=62 J P 8=14 T L R 109.

[9] Satya Naryan Singh v. Satya Niranjan Chakravarti, A I R 1924 P C 5=79 I C 825=51 I A 37=3 Pat 183 (P C).

To justify this inference however the link must necessarily be established that the particular parties and the third parties whose conduct is actually proved stand on the same footing either by belonging to the same community or group, or—and here we take a further step—to a community so similar to the one in question that the inference in question may be legitimately drawn. That the instance relied upon consists of an instance proved in Court,—an instance moreover in which the Court delivered judgment on the basis that the particular parties then before the Court had adopted a particular rule of conduct,—does not (in respect of the aspect with which I have so far dealt) differentiate the instance from other instances. Thus, Sir Lawrence Jenkins, delivering the decision of the Privy Council in *Muhammad Ibrahim Rowther* v. *Shaikh Ibrahim Rowther*[1] alludes to the previous decrees and judgments as documentary evidence and not as binding decisions having the force of law. The distinction between such an instance followed by a judgment and other instances consists in the weight to be attached to the instance. The judgment may of course make the matter res judicata if all the requirements of S. 11, Civil P. C., are satisfied. On the other hand, the previous judgment may be merely evidence under Ss. 40, 41, 49, 87, 32 (4) or similar sections of the Evidence Act, or as in 58 I A 125,[13] the judgment may be admissible under the provisions of Ss. 13 and 43, Evidence Act, as only establishing a particular transaction in which the custom was asserted and recognized. "The reasons upon which the judgment is founded," said Sir George Lowndes,

> are no part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case.

Even in such cases the practical effect of the previous judgment or decision may by reason of the quantity and nature of the evidence then adduced be that third parties may not consider it worth their while to contest once more the applicability of the customary rule to themselves, although they were not strictly bound by the previous decision, and although the decision did not make the matter res judicata : *Mirabivi* v. *Vellayanna*[10]; (1919) A C 801[14] and 14 M I A 377.[15] Or the custom may have been continually put forward and proved by evidence, so that the time has come when a Judge may say that he no longer requires it to be proved, but that he will take judicial notice of it : (1911) 2 K B 445[16] cited in *Kunhambi* v. *Kalanthar*.[11] *cf*. 55 I A 407.[17] This last case refers not to decisions but to the record of custom in the riwaj-i-am.

Then there was a second set of principles that Lord Buckmaster enunciated with reference to the standard of proof in *Abdul Hussein Khan* v. *Bibi Sona Dero*.[2] These had reference to the fact that :

> The position and relationship of the different members of the family must always be considered in determining whether claims are not met because the rights to which they related do not exist, or whether they are put on one side because, in the circumstances, there is no need that they should be asserted.

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10. **Mirabivi v. Vellayanna, (1885) 8 Mad 464.**
11. **Kunhambi v. Kalanthar, A I R 1915 Mad 711 =24 I C 528=38 Mad 1052=27 M L J 156.**
12. **Khatubai v. Md. Haji Abu, A I R 1922 P C 414 =72 I C 202=50 I A 108=47 Bom 146 (P C).**
13. Govinda Narain Singh v. Sham Lal Singh, AIR 1931 P C 89=131 I C 753=58 I A 125= 58 Cal 1187 (P C).
14. Les Affreteurs Reuns Societe Anonyme v. Leopold Walfold (London), Ltd., (1919) A C 801=88 L J K B 861=121 L T 393=35 T L R 542=24 Com Cas 268.
15. Mt. Bebee Bachun v. Sheikh Hamid Hossein, (1871) 14 M I A 377=17 W R 113 (P C).
16. George v. Davies, (1911) 2 K B 445=80 L J K B 924=104 L T 648=27 T L R 415.
17. Vaishno Ditti v. Rameshri, A I R 1928 P C 294=113 I C 1=55 I A 407 (P C).

In this connexion a part of Turner, C.J.'s and Hutchins, J.'s judgment in *Mirabivi* v. *Vellayanna*[10] was cited, and entire agreement was expressed with it. There, instances had been adduced in which: (1) claims of daughters and sisters to a share had been ignored, or (2) they had been allotted maintenance, or (3) married daughters had been treated as estranged from the family.

It was held however that instances of this kind did not count for much, because: (i) they will be found to occur where there is no doubt that the family is governed by pure Muhammadan law; (ii) indeed in many parts of the country it is unusual for Muhammadan ladies to insist on their unquestioned rights; (iii) they will often prefer being maintained by their brothers to taking a separate share for themselves, and (iv) when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they would claim. Moreover (v) Muhammadan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much.

Lord Buckmaster alludes to the provisions of the Quran by which women are not to be excluded from a share of inheritances: *Abdul Hussein Khan* v. *Bibi Sona Dero.*[2] The law of Islam is insistent on this point. Female relations are not only included in the list of persons entitled to inherit under special conditions. The Quran lays it down as an independent principle of general applicability in these terms: "Men ought to have a part of what their parents and kindred leave; and women a part of what their parents and kindred leave." This principle is contained in the Quran 4, 8 (Surat-un-Nissa). The object of enunciating this principle was to remedy the pre-Islamic law under which women were incompetent to inherit. The importance of the principle cannot be overlooked. The state of the pre-Islamic law which this provision of the Quran was intended to abrogate is strikingly brought before us in Robertson Smith's well known work on "Kinship and Marriage in Ancient Arabia." Thirdly, in laying down the standard that the evidence must attain in order that a custom may be held to be proved, Lord Buckmaster also cited two observations of Crouch, A. J. C. (45 I A 10[2]), which I will presently cite. These observations were approved with the reservation that (a) an example of each of the conditions there laid down ought certainly to be established by some witness; but (b) that it is not necessary that all should be proved in every case, as this might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight is due. Crouch, A. J. C. had observed: (1) That it was necessary to reject as useless for proving the custom all the instances (i) where there was no evidence that the deceased left any estate at all; or (ii) where there was no evidence to show its nature or value; or (iii) the amount of liability against it, e. g., whether or not it consisted merely of a jagir, or muafi land, or of heirlooms, or of land heavily mortgaged, or of the family demesne; (iv) where there was no proof and no admission that the lady said to have been excluded had a legal claim to a share under the ordinary law; (v) where in case of a married lady, there is no evidence showing the actual amount of dowry received; (vi) where, in case of married ladies, there is no proof that they knew of the custom and stood aside in obedience to it.

(2) In all those cases where a witness states that he has himself excluded his own sisters, or nieces, our judgment as to the value of such statement as evidence of the custom having been enforced must be held in suspense until there is also evidence before us that the ladies had independent advice, and with full and intelligent knowledge of the custom, voluntarily acquiesced in their exclusion.

Accordingly when Lord Buckmaster examined the evidence in the case before him he alluded to the circumstances that (1) in certain instances there was no substantial evidence of the property to be divided; (2) that in the most recent cases of all there was only one witness who spoke in their support though there must have been others who could have spoken upon the matter; (3) that the revenue records were not produced. Connected with the last matter are a fourth set of principles, which are brought out in the judgment of Lord Buckmaster. Logically I ought to have mentioned them first. Custom, when relied upon as modifying the ordinary law of succession, must be a custom well known and distinctly ascertained. It must be pleaded specifically and with certainty and proved as it is pleaded. It must be established to be so (i. e., ancient and invariable).

by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

Lord Buckmaster therefore in dealing with the case before him first undertook to define the custom that the appellant alleged. It was alleged in three different forms: (1) in a plaint in another suit; (2) in an affidavit two days before that plaint; and (3) in the plaint in the proceedings under appeal. Though their Lordships observe that there was a marked difference between the different customs they were not prepared to give this fact such a weight as to crush the appellant's case. The real significance of this observation can only be appreciated if the difference in the three allegations—which their Lordships characterize as a marked difference—is compared and it is borne in mind that two out of the three were not in the proceedings under appeal. Again in *Muhammad Ibrahim Rowther* v. *Shaikh Ibrahim Rowther*[1] the custom was stated in the written statement in a wider and narrower form and Sir Lawrence Jenkins observes (p. 122) :

> The custom "has been forcibly criticised by the learned Subordinate Judge in the course of his careful and discriminating judgment. He points out that in its wider assertion it is untenable, and even in its narrower form it is not established. He might even have gone further and pronounced the pleadings bad".

I have extracted these principles defining the standard of proof for establishing a custom as it seems obvious that they have been disregarded by the lower Courts, carefully though the evidence has been considered. I will proceed to apply the principles to the evidence before us. As I have already stated the custom considered to be proved in the present case was very different from that which was pleaded. With reference to the decision of the trial Court that a custom of survivorship in particular circumstances had been proved, in my opinion, on the evidence there can be no finding in favour of survivorship at all consistent with the allegations in the written statement. The allegations in the written statement proceed on the basis of the existence of the joint family system and the law of survivorship being applicable. The rule of survivorship in the joint family according to Hindu law and usage, as regards property and family rights, is said to apply to them; and it is observed that the two brothers were living together as members of a joint family and that the whole property of the family was joint and undivided, and the father was the manager of the joint family. The law of joint family and survivorship depends on there being persons who are jointly interested in the property and that implies a right to demand partition: *see Rani Sartaj Kuari* v. *Rani Deoraj Kuari*,[18] referred to by Beaman, J. in *Jan Mahomed* v. *Datu Jaffer*.[4] It is admitted by the witnesses for the defendant that no right to demand partition is recognised by the custom by which the defendant says that the Sunni Bohras of Borsad taluka are bound.

It was pressed upon us that there was no misunderstanding on the part of the plaintiffs with regard to the allegations relating to the custom; that the trial had proceeded on a clear appreciation of what those allegations were; and that it may be taken that the whole of the evidence referred to the allegations as actually intended to be made by defendant 1 and as in fact understood by the plaintiffs. This argument is based on the unwarranted assumption that the custom prevails as alleged by the defendant, and that therefore it must be known to the plaintiff. Alternatively it is argued that defendant 1 should not, in regard to the allegations of the custom, be held strictly to his written statement. In my opinion the principles I have just extracted are emphatically opposed to any such procedure. The foundation on which a custom is enforced by the Courts is that the parties have been guiding themselves by a particular course of conduct of their own volition. Adoption of the custom by their own volition is the basis on which customs are enforced. It is deemed to be contrary to justice, equity and good conscience to make the parties act in disregard of their habits, their methods of dealing with property, and the expectations formed as to the devolution of estates, succession and inheritance. It seems obvious in view of these considerations that a person who comes forward stating that there is a particular customary rule, should be able without any great effort on his part to enunciate the custom with certainty and precision. It is difficult to believe in the existence of a custom, the propounder of which is himself unable to state it in precise and clear terms. It is the foundation on which the force of the custom rests that the custom should be well known, should be clearly understood and should be the standard by which the parties have been guided in their conduct. I cannot therefore consider that the enunciation of the custom in the written statement can be allowed to be altered on the ground that it must be taken as a loose statement on the strength of which any allegations supporting the defendant's case may be entertained.

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[18] (1888) 10 I A 272=15 I A 51=5 Sar 139 (P C).

In another form, the argument was that because the defendant asserted the custom too broadly he should not be prevented from proving it in a narrower form, provided that the form in which it is proved is sufficient for success in the suit; that, speaking with reference to the case, it is enough if it is shown that there are cases where women have been excluded if there are sons or brothers, and that the rest of the allegation in the written statement may be treated as surplusage. I will assume that a party may plead custom in broader terms than he is able to prove and may yet succeed. But this assumption must in any event be subject to the case coming within the principle alluded to by Lord Buckmaster, viz., where the applicability of the custom in its narrower form is not contradictory of the allegation that it prevailed in the broader form. Here the defendant asserted that the law of joint family property prevailed. At the trial one necessary condition of joint family property was shown to be absent. If a new custom is allowed to be proved which is consistent with the absence of that condition that custom is necessarily inconsistent with the custom alleged, since the new allegation is reconcilable with that which is inconsistent with the original allegation. The two cannot be said to be merely a broader or narrower form or the same custom. In such a case the plaintiffs who deny the existence of the custom may well say that though the burden was on the defendant to prove the custom which had been pleaded, as a matter of fact, its existence had been disproved by positive evidence adduced by the defendant himself, and that the plaintiffs were not concerned with any other part of the evidence, notwithstanding that that other part of the evidence taken by itself may tend to prove what was not alleged and was not in issue. The lower appellate Court does not consider the custom of survivorship proved; on the contrary it expressly finds it disproved. The trial Court considered it unnecessary to decide whether it had been proved that partition could not be claimed by the son from the father; and yet if this fact were held to be proved the allegations in the written statement were disproved.

But putting aside variation from the allegations in the written statement, and taking the evidence as it stands, it seems to me to be quite inadequate for deducing from it any consistent custom in a form that will enable the defendant to deny the plaintiffs' claim. There are witnesses who admit that the mother of the brother is either entitled to a life-estate in the property of her deceased son, or to receive such compensation as would satisfy her: Exs. 90, 91 and 93. Other witnesses disprove the recognition of any joint property, and therefore disprove the allegation that the community to which the parties belong is governed by the law of joint family property and the law of survivorship. Coming to the instances mentioned in evidence they have been carefully stated by the learned Judge under fifteen items. They cannot stand scrutiny in the light of the principles to which I have referred. I will not go through the instances in detail, but will be content to refer to some of them, indicating the criticism that must be levelled against the evidence as a whole. The first instance referred to in the lower appellate Court's judgment is quite inconsequential. There were three brothers of whom one Asmal died first. His widow and daughter continued to live with Karim, the eldest brother. The widow remarried after two or three years and left the daughter with Karim, who continued to look after her. There was no partition of the property. The eldest brother Karim was looked upon as the head of the family. He supported and took care of all the younger members. The facts are consistent with any of the three alternative modes of succession stated by me.

In the second instance, Nurji and Abhram were brothers. Abhram was the younger brother. He died first leaving a son and daughter. Nurji's widow is alive and is not called. Exs. 38 and 39, who speak to the instance, do not know of the arrangements made. There was an oil mill about which there is no information.

The widow is evidently living in comfort. The evidence does not explain the situation with any details. Why is this instance to be taken to support the defendant and not plaintiff ? Miyaji, Ex. 39, examined on commission, speaks to instance No. 3. He is himself a party interested in it. He states that he himself, Miyaji, Rasul and Rehman were three brothers; and that Rasul's mother Sakarbai was excluded. But on examination it is found that after one of the three brothers died, the two others continued to live with the mother Sakarbai for many years; and it was only after her death that the two brothers came to a partition. The evidence does not refer to any case where the status of jointness has been brought into antithesis with that of tenancy-in-common. There is no case sufficiently clear and with adequate particulars relating to the mother. Taking it all together it creates no definite effect on the mind that either the witnesses or the parties concerned knew of the rules of law of which the witnesses purported to speak or to distinguish between joint tenants and tenants-in-common. The impression produced is that each witness deposes to what he thinks would be most in his own interest.

Certain vague notions as to what is proper or what members of a family are expected to do seem to be the springs of action and the basis of the evidence given. Each witness states the law as suits his own situation. Evidence of such notions cannot establish a custom so as to control the rights of parties in opposition to established law. No woman is called. Men depose, whose interest it is to deny all rights to women. A good example of the hazy notions in the minds of the witnesses is the way in which they refer to brothers living in union. The learned Judges in the Courts below also seem to be imbued with the notion that the parties must necessarily be governed by the law of survivorship. They introduce notions of property and rights exclusively Hindu, without any of the witnesses having spoken to them. They are willing to strip the doctrine of survivorship of the characteristic features of the joint family in order to fit it to the evidence that has been adduced. Any rule that will exclude females or introduce the Hindu law is sufficient. In Ex. 112 (judgment in Civil Suit No. 104 of 1920) the learned Judge holds that Karanji's husband had separated from his brother. But this is a mere assumption. There is no good ground for holding that there was a separation.

The Judge's preconceived notions—notions that have evidently found their way in the Judge's mind by the processes whose fallacy is exposed by Robertson J.—must somehow be satisfied. If it is necessary to assume a partition, let a partition be assumed. In the arguments before us it was suggested that when a defendant says that sons take by survivorship, he means that female heirs who would have taken under Muhammadan law are excluded. Exs. 93 and 94 speak of a widow being entitled to life estates. They are ignored. Occasionally an exclusion of women even beyond the rules of Hindu law is suggested and apparently accepted. Ex. 91 admits that he does not know of any case in which a woman fought for getting her share and was refused. The judgment, Ex. 119, applies Muhammadan law to the parties there concerned. No attempt is made to apply to any of the witnesses the tests that Lord Buckmaster requires to be applied, before it can be held that women are excluded entirely from all rights of inheritance. I have already stated why I attach special importance to this particular aspect. It seems to me therefore that when the evidence is considered by the standard to which I have alluded, it entirely fails to attain the standard necessary for establishing that any such custom has been proved as the defendant took upon himself to set up and prove. In my opinion the appeal must be allowed and a preliminary decree passed under O. 20, R. 13. The case must go back to the trial Court for taking accounts of the property of the deceased Gafoor Kasim as mentioned in prayers 1 and 2 to the plaint, para. 14, on the footing that plaintiff 1 is entitled to a half share in the property as heir of Ibrahim under Hindu law. The appellants will be entitled to their costs throughout.

Broomfield, J.—This is a second appeal arising out of an administration suit relating to an estate formerly belonging to one Gafoor Kasim, a Sunni Bohra of Vallasan in the Borsad Taluka. The case raises an important and difficult question as to the application of the Hindu law of inheritance, succession and survivorship to Sunni Bohras of Gujarat. Gafoor, former owner of the estate to be administered, died in February 1922, leaving him surviving Ismail (defendant 1), a son by his first wife, Sakar (plaintiff 1) his second wife, and Ibrahim, a son by Sakar. Asan (plaintiff 2), a daughter by Sakar, was born posthumously. Ibrahim was only eight when his father died, and himself died in June 1923. The plaintiffs, who alleged that Muhammadan law applies, claimed 6/15ths of the estate, that being the sum of their shares as wife and daughter of Gafoor and mother and sister of Ibrahim. In the alternative it was claimed that if Hindu law applies, Ibrahim got a half share in Gafoor's estate which went to his mother, plaintiff 1 on his death. The defence set up in the written statement was that the parties are governed by the Hindu joint family law and that, on Ibrahim's death, defendant 1 became owner of the whole estate by survivorship to the exclusion of the plaintiffs who are entitled to maintenance only. Both the lower Courts have held that the Muhammadan law does not apply and the plaintiffs are not entitled to any share in the estate.

The trial Judge finds that the parties are governed by the Hindu law of inheritance and succession and that as between brothers who have not divided their ancestral property they are governed by the principle of survivorship obtaining in joint Hindu families. He does not hold that all the incidents of the Hindu joint system apply, and he has given no clear finding on the question whether on Gafoor's death Ismail and Ibrahim became joint tenants or tenants-in-common. But he thinks the evidence in the case proves the proposition that in the case of an ancestral estate which is not divided between brothers the principle of survivorship applies, and if one brother dies, the surviving brother takes the whole estate by survivorship in preference to the mother of the deceased. The learned First Class Subordinate Judge who heard the appeal was not prepared to accept the principle of survivorship at all. His finding on the material issue is that the parties are governed by the Hindu law of inheritance and succession, but not by the law of survivorship. He holds that the evidence establishes a special custom by which a joint brother excludes females. When he speaks of brothers being joint however he makes it quite clear, in my opinion, that he does not mean joint in estate. He finds in fact that Ismail and Ibrahim were tenants-in-common and not joint tenants. The learned counsel for the respondent attempted to argue that the learned Judge did not really intend to postulate a separation in interest between them. But when an experienced First Class Subordinate Judge uses the expression "tenants-in-common" in contradistinction to "joint tenants" and expressly negatives the application of the doctrine of survivorship, we must take it that he uses these expressions in their ordinary legal sense. The learned Judge's view is that if brothers are living together and there is no actual visible division of the property, when one brother dies the whole estate goes to the surviving brother or brothers not by the law of survivorship but by what he takes to be the custom which excludes females in such a case.

The learned counsel for the plaintiff-appellants has not seriously disputed the finding that Mahomedan law does not apply and in this respect there seems to be no good reason to differentiate the Sunni Bohras of Borsad taluka from other Sunni Bohras of Gujarat or from the Memons and Khojas in whose case the law is well settled. The presumption is that these Hindu converts to Islam are governed by the Hindu law of inheritance and succession, though since *Jan Mahomed v. Datu Jaffer*[27] and 41 Bom. 181,[28] that presumption has been held to be limited to the law of inheritance and succession in the strict sense, i. e. as applicable to the estate of a separated Hindu. In *Jan Mahomed v. Datu Jaffer*[27] Beaman, J. pointed out the difficulties in the way of applying the law of the coparcenary to Mahomedans. There can be no presumption that that law applies as a whole to a Mahomedan community. It is possible that that law or a particular incident of that law may form part of the customary law of a community, but that can only be so by a special custom which must be alleged and proved. I must confess that I had some difficulty in understanding the position of the learned counsel for the respondent. He drew our attention to the earlier decisions of this Court such as 12 B H C R 281[30] and 9 Bom 115,[31] in which the law of the coparcenary was applied to Mahomedans, and he pointed out that the propositions enunciated by Beaman, J., in *Jan Mahomed* v. *Datu Jaffer*[4] were not strictly necessary for the decision of the case before him. But the conclusions at which that learned Judge arrived after an exhaustive discussion of the whole of the case law cannot possibly be regarded as mere obiter dicta. These conclusions were endorsed in 47 Bom 369,[7] and in essence have never been dissented from since. Ultimately, Mr. Coyajee, if I understood him correctly, did not dispute the position that the presumption as to the application of Hindu law extends only to the simple law of inheritance and succession as in the case of separate property, and that the application of the coparcenary law is not to be presumed and must be proved.

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[28] Advocate-General of Bombay v. Jimbabai, A I R 1915 Bom 134=31 I C 106=41 Bom 181=17 Bom L R 799.

[30] Suvoji Hussein v. Dosa Mavji Khoja, (1875) 12 B H C R 281.

[31] Ashabai v. Haji Tyeb Haji, (1885) 9 Bom 115.

Mr. Jayakar for the appellants, relying on the findings of both Courts that the law of the coparcenary cannot be applied as a whole and especially on the finding of the Court of first appeal that Ismail and Ibrahim were tenants-in-common, argues that according to the law of inheritance to a separate Hindu, plaintiff 1, as mother, must succeed to her son in preference to his divided brother. He contends that the defendant in his written statement alleged nothing less than that the law of the joint family applies; that the trial Judge did not accept that plea; that the Court of first appeal expressly negatived it; and that a special custom of exclusion of females as something distinct from the law of joint ownership and survivorship was never alleged and ought not to be made the basis of the decision. He contends further that in any case there is no satisfactory evidence of any such custom.

Although the learned counsel for the respondent attempted to argue the contrary, there cannot be the slightest doubt in my opinion that the Court of first appeal decided the case on the basis of a custom which was not set up in the written statement. I cannot put any interpretation on the written statement except that the defendant alleged that the parties are governed by the Hindu joint family law. There are several references to usage, no doubt, but only in respect of the application of the Hindu coparcenary law and survivorship as an incident of that. There is no reference to a special custom of excluding females. Issue 4 as finally framed by the trial Court after much discussion (*see* Ex. 109), correctly represents the pleadings. As the case was understood by the pleaders and the Court, the point in dispute was whether the Hindu law was to be applied, and if so, whether it was to be the Hindu law of joint families, in which case the defendant would take the estate by survivorship, or the Hindu law of inheritance and succession in the case of persons separated in interest, in which case plaintiff 1 would succeed as heir to her son. If the defendant had proved part of his case, if while failing to prove that the joint family law applies as a whole, he had proved that some particular incident or incidents of that law applied, that would have been a case of the whole including the part, or the greater including the less. It could not be said to be a new case. But the special custom which the defendant was allowed to set up in appeal is not an incident of Hindu law at all. Under Hindu law there can be no exclusion of Ibrahim's mother by his brother except on the footing that Ibrahim and his brother were joint in estate. It has been held that they were not joint in estate. When the Court of first appeal therefore framed the issue as to a special custom of exclusion of females, it was undoubtedly allowing a new case to be set up.

Speaking for myself, I should not be prepared to go so far as to say that this is necessarily fatal to the respondent's case. In *Abdul Hussein Khan* v. *Bibi Sona Dero*[2] there was considerable variation in the description of the custom alleged, but their Lordships of the Privy Council did not consider that that fact had sufficient weight to crush the appellant's case. But the fact that the special custom in question was never specifically alleged is undoubtedly a strong point against the defendant on the merits. If the party who relies on the custom is unable to define it, and leaves it to be deduced from evidence called to prove something quite different, the Court may well be suspicious as to whether there is such a degree of certainty about the custom that it is deserving of recognition by the Courts.

We have carefully scrutinized the evidence in the case which consists almost entirely of depositions of witnesses examined by the defendant. As my learned brother has dealt with it, I shall only do so on general lines. In my opinion the defendant has failed to establish either that the principle of survivorship applies, or that there is any certain invariable custom by which plaintiff 1 is excluded from succeeding to her son's estate. The fundamental doctrine of the coparcenary that a son acquires an interest in the family estate by birth is not even suggested in the evidence. It is admitted that a son cannot claim partition during his father's lifetime. Jointness is only predicated of brothers, and though the witnesses speak of "joint" and "separate" brothers the idea of joint ownership of property in the former case and separate ownership in the latter is not insisted upon and seldom even definitely stated. In fact the evidence is mainly directed to show that in certain cases females are excluded. It is remarkable how little evidence there is bearing on the case of the mother. In fact there seems to be no authentic instance deposed to of a mother being excluded from a share. Some witnesses assert that she would be excluded, like the widow and daughter, without referring to any cases in which this has actually happened. On the other hand others admit that the mother may take a life-estate.

Mr. Coyajee has argued that if the exclusion of a widow and daughter is proved, they being nearer heirs under Hindu law, exclusion of the mother may be presumed. But the custom is by no means clear, even in the case of the widow and daughter. It was admitted by some witnesses that the widow of a "separate" brother gets a life-estate. As regards daughters, the evidence, if it proves anything at all, proves that they are always excluded independently of any question of jointness or separation. Instances such as Nos. 9, 10 and 11 in the judgment of the Court of first appeal prove nothing to the purpose, or at any rate, nothing more than that Mahomedan law does not apply, for daughters would always be excluded by sons by the Hindu law of inheritance. The evidence as to exclusion of daughters by brothers or other agnates appears to have no necessary reference to any doctrine of jointness. Thus witnesses Exs. 89, 90 and 93 assert that the daughter and also the sister never inherit in any circumstances. To hold that daughters can never be heirs and therefore inferentially that a mother can never be an heir, would be too flagrant a departure from the case set up in the written statement and the arguments.

There is surprisingly little evidence of judicial pronouncements as to the law by which this community is governed. Ex. 119 is a judgment in a suit brought by a daughter to recover her share of her father's property, and the defendants were a brother and a nephew of the father. The defence set up was that daughters are excluded by custom, but no evidence whatever was produced in support of the custom which was held not proved. The suit was therefore decreed. But as the plaintiff had claimed her share under Mahomedan law, i. e., one-half, she was given that share and not the whole estate to which she would appear to have been entitled under Hindu law. Ex. 112 is a judgment in a suit brought by an alienee from the widow of the last male holder against a brother of her husband. It was held that the Hindu law of succession applied and that the widow had a Hindu widow's estate. But the learned Subordinate Judge who decided the suit took the view that there had been a partition between the brothers. Ex. 117 is a judgment of this Court confirming the decision of the Courts below and holding the widow to be entitled to succeed to the estate of her deceased husband in preference to the agnates. It does not appear from the judgment who these agnates were. These judgments perhaps do not take us very far, but the one in the daughter's case, at any rate, is inconsistent with the defendant's contention. On the other hand there is no evidence that it has ever been held by any Court either that the principle of joint ownership and survivorship applies to this community, or that there is any custom of exclusion of females here which would defeat the claim of plaintiff 1.

I therefore agree with the conclusions at which my learned brother has arrived and with the order which he proposes to make. I need only add in that connexion that the view which the learned First Class Subordinate Judge (A. P.) appears to have taken (*vide* last paragraph of his judgment) that even if plaintiff 1 is entitled to a share she must sue for partition, and cannot maintain an administration suit, has not been supported in the arguments before us. It is in fact conceded that it is a mistaken view.

K.B./A.L. *Appeal allowed.*

A. I. R. 1937 Bombay 80

BEAUMONT, C. J. AND WASOODEW, J.

Emperor.

v.

Marshal—Accused.

Criminal Ref. No. 57 of 1936, Decided on 29th July 1936.

Criminal Trial—Enhancement of sentence—Motor driver driving his car rashly at high speed—Passing over another car and then losing control—Collision of car with tree and death of occupants—Trial Court passing sentence of 4 months' R. I.—Reference for enhancement—Act though rash, death was not natural consequence of his act—Enhancement uncalled for.

The accused while he was driving his car at an excessive speed, on a straight uncrowded road, wanted to pass over another car in front of him. After having passed over the car, he turned to his left in order to bring his car to the correct side of the road. But in doing so he lost control and the car collided and three of the occupants in his car were killed. He was tried under S. 304-A and sentenced to four months' rigorous imprisonment. On reference for enhancement of sentence to the High Court:

Held: although the accused was not a capable driver in not being able to control a vehicle at high speed, yet the death of the occupants was not a probable result of his incapacity. Hence there was no reason for enhancement of sentence. [P 80 C 2]

Beaumont, C. J.—This is a reference by the District Magistrate, Bombay Suburban District, asking us to enhance the sentence of four months' rigorous imprisonment passed upon the accused for an offence under S. 304-A, I. P. C., that is for causing death by a rash and negligent act.

Having gone through the record, I think there is no doubt as to what happened. The accused was driving a car from a wedding party. He had four passengers at the back and two in the front, which was two more than the car was properly capable of holding. He started from the party some distance behind another car which was driven by a man named Nasservanji, and on the Ghodbunder road the accused desired to pass Nasservanji's car. The evidence is that the road is a straight road thirty-four feet wide and therefore there should have been no difficulty whatever in passing another car even at considerable speed. It is not suggested that there was any obstruction on the road at the time. However, according to the evidence, both the cars got into something in the nature of a race. What happened, I apprehend, was that, as soon as the accused began to pass Nasservanji, Nasservanji not wanting to be passed by another car of the same party, accelerated the speed of his car, and probably the accused had to go faster than he intended, in order to get past the other car. Having got past the other car,—and the evidence of the only independent witness is that the car was going at the speed of forty or fifty miles an hour,—the accused swerved to the left in order to get back to the proper side of the road, and in so doing, he lost control of his car which ran off the road, collided with a tamarind tree, and was thrown into a field, with the result that three of the passengers sitting in the back seat were killed. I think the accused was guilty of a rash and negligent act, because although if he had been a really competent driver, he ought to have been able to pass another car, even at the speed of fifty or sixty miles an hour,—the road being straight and there being no obstruction, still it is clear from the circumstances of the case that the accused was not capable of controlling the car while going at that speed. He evidently swerved to the left much too sharply, having regard to the pace at which he was going and the load in his car, and I think that was his rash and negligent act. When he found that he could not pass the other car, without going at an excessive speed, he ought to have refrained from doing so. But I do not think that in a case of this sort, we can measure the sentence to be imposed by the consequences of the act, unless those consequences were necessarily inherent in the act. If, for instance, a man drives car rashly and negligently into a crowd of people, one might say that that was a grossly rash act, because he was bound to kill or injure many people. But one cannot possibly say that going at too excessive a speed in order to pass another car, the accused was bound to kill the occupants in his own car. Having got six passengers in his car besides himself, it was certainly necessary for him to be careful. But I do not think we can hold that the fact that three deaths resulted is a circumstance which ought greatly to enhance the punishment to be inflicted for the rash and negligent act of the accused. I do not think that the death of the three persons was at all a natural and probable consequence of his act. In the circumstances, the rash and negligent act of the accused being in driving at a speed at which he was unable to control the car, I do not think we are in a position to say that the punishment of four months' rigorous imprisonment inflicted by the Magistrate was so grossly insufficient, that we ought to interfere in revision.

I think therefore that there should be no order on the reference. The Rule is discharged.

B.D./D.S. *Rule discharged.*

A. I. R. 1937 Bombay 81

B. J. WADIA, J.

Motilal Chimanram and *another* — Plaintiffs.

v.

Sarupchand Prithiraj and *others* — Defendants.

O. C. J. Suit No. 1258 of 1930, Decided on 7th November 1935.

(a) Partnership — Dissolution—Effect of—Rights of partners after dissolution — After dissolution partnership subsists merely for winding up its business and adjusting rights of partners inter se—Each partner has power to bind firm by all acts necessary for winding up and to complete transactions already begun — Creation of novatio in respect of debt owing to firm is not such necessary act—Partners are not bound by it unless they consent to it previously or ratify it afterwards.

Though the dissolution of a firm causes a dissolution of the partnership between the partners, the partnership still subsists, but merely for the purpose of winding up its business and adjusting the rights of the partners inter se, and for this purpose the authority of the partners to bind the firm, and all their other mutual rights and obligations, continue notwithstanding the dissolution. The power of each partner, however, extends only so far as it is necessary to wind up the affairs of the firm and to complete transactions already begun. If a debt is owing to a firm, payment by the debtor to any one of the partners extinguishes the claim of all the partners and discharges the debtor, even though a particular partner or a third person is appointed to collect the debts owing to the firm, and whether the debtor is aware of such appointment or not. Any partner of a dissolved firm can therefore recover payment of a debt due to the firm. He can effectually release the debtor and also give a valid receipt for the debt. But neither the release nor the receipt will be binding on his co-partners if the receipt is given, or the releasing partner acts, in fraud of his co-partners and in collusion with the debtor. It is not a necessary act in the winding up of a dissolved firm of a partner to create a 'novatio' in respect of a debt owing to the firm. That is not recovering a debt, but really continuing it through somebody else as the debtor. His partners may previously consent to it or subsequently ratify or acquiesce in it ; otherwise it is not binding upon them. But even assuming for the sake of argument that the making of a 'novatio' is a necessary act in the winding up, it will still not be binding upon the co-partners, if it is tainted by fraud or collusion. So a partner cannot, on his own authority, bind his co-partners by allowing moneys due by one firm to be paid by another firm with which his co-partners have no concern.
[P 83 C 1,2 ; P 84 C 1,2 ; P 85 2 ; P 87 C 1]

(b) Partnership—Dissolution—Interest— In absence of express agreement interest does not run on capital account of each partner after dissolution—Stipulation that interest should run on capitals of partners may be presumed from usage of those carrying on partnership business.

It has been well established that in the absence of an express agreement no interest would run on the capital account of each partner after dissolution. Such an agreement may either be express or it may be inferred if the partners have themselves been in the habit of charging such interest in their accounts. A stipulation that interest should be allowed on the capitals of the partners may be presumed from the usage of those who carried on the partnership business. But where interest on capital is payable, it stops running at the date of dissolution, unless otherwise agreed. [P 88 C 1]

(c) Admission—Legal practitioner—Admission purely of fact but made under misapprehension is not binding on client.

Where an admission by a pleader is purely of fact, it is not binding on the client if it is made under misapprehension : *Hickman* v. *Berens*, *(1895) 2 Ch 638*, *Rel. on.* [P 88 C 2]

(d) Partnership—Interest—Agreement that no interest should be paid on capital account, if pleaded, is to be proved in Court and not before Commissioner.

The agreement that no interest should be paid on capital account after dissolution of partnership, if pleaded, is ordinarily to be proved in Court and not before the Commissioner. The mere fact that interest on a particular basis was not claimed in the pleadings should not preclude the plaintiff from proving the same event at a late stage in the Court in order to enable the Court to determine all the questions in controversy between the parties before the final decree is passed. [P 89 C 1, 2]

(e) Partnership — Capital — Interest on, before dissolution.

In the absence of an express or implied agreement to the contrary, a partner is not entitled to interest on the capital accounts even before dissolution unless there are profits. [P 94 C 1]

M. P. Amin—for Plaintiffs.

K. M. Munshi and *Lalji Gokaldas* — for Defendants 1 to 4.

Judgment. — On 24th June 1930, the plaintiffs took out this originating summons against the defendants for dissolution of the partnership firm known as the "New Bombay Flour Mills Company" and for an order that the accounts of the partnership should be taken and its affairs wound up by and under the directions of the Court. The partners of the firm, which I will shortly refer to as "the suit partnership," were the firm of Chimanram

Motilal consisting of the plaintiffs and defendants 2, 3 and 4 with a ten annas share, and 1st defendant firm of Messrs. Sarupchand Prithiraj with a six annas share in the rupee. In the firm of Chimanram Motilal the plaintiffs had a ten annas share, defendants 2 and 3 had a share of four annas, and defendant 4 a share of two annas in the rupee. The suit partnership purchased a flour mill in Bombay in October 1926, after which it commenced doing business. On or about 2nd November 1927, the suit partnership was dissolved, and an agreement to sell off the mills was entered into about the same time. The sale of the mills was completed in June 1929. Prior to the dissolution of the suit partnership the firm of Chimanram Motilal was dissolved in or about June 1927, and the disputes between the partners of that firm were referred to arbitration, but, it appears, have not yet been settled On 12th October 1934 a decretal order of reference was made to the Commissioner to take the usual partnership accounts of the suit partnership. The Commissioner made his report on 14th March 1935, and ascertained that a sum of Rs. 76,192-3-9 was due by the suit partnership to the firm of Chimanram Motilal, that a sum of Rs. 57,692-3-9 was due by 1st defendant firm to the suit partnership, and that a sum of Rs. 18,500 belonging to the suit partnership was in the hands of Messrs. Mulla & Mulla, its solicitors.

Two sets of exceptions to the report have been filed, one by 1st defendant firm on 1st April 1935 and the other by the plaintiffs on 3rd April 1935. I will first deal with the exceptions filed on behalf of 1st defendants. The first six exceptions relate to a sum of Rs. 50,000 which, according to 1st defendants, was paid by them to defendant 2, a partner of the firm of Chimanram Motilal, for and on account of that firm. The payment was made by making certain 'havala' entries to which I will subsequently refer. Plaintiffs denied the payment and objected to the item of Rs. 50,000. The objection was allowed by the Commissioner, and 1st defendants contend that the objection should have been disallowed. It is common ground that the sum of Rs. 50,000 was not paid to defendant 2 in cash, 1st defendants' case, according to the evidence of Brijlal Ramjidas, the son of one of its partners, and who subsequently became a partner himself, is that when the business of the suit partnership was closed, and the sale proceeds of the mill were realized, moneys were due to the firm of Chimanram Motilal in its account with the suit partnership, that defendant 2 as a partner of the firm of Chimanram Motilal asked Brijlal for payment of a sum of Rs. 60,000 to Rs. 65,000, and Brijlal said he would pay after the sale was completed. The sale was completed on or about 22nd or 23rd June 1929, and on 24th June Brijlal offered to pay Rs. 50,000 to defendant 2 on account, but defendant 2 told him to credit the sum to the account of another firm, viz. the firm of Narandas Kedarnath, in the books of 1st defendants, and to debit it to Chimanram Motilal in the books of the suit partnership, to which Brijlal presumably agreed. It may be mentioned here that defendants 2 and 3 along with several other persons are also partners in the firm of Narandas Kedarnath, but the other partners of the firm of Chimanram Motilal, among them being the plaintiffs, are not partners in the firm of Narandas Kedarnath.

In pursuance of the agreement between defendant 2 and Brijlal, entries were made in the journal of the suit partnership which was lying with 1st defendants at their 'pedhi' near the Share Bazar, debiting Rs. 50,000 to the firm of Chimanram Motilal, and crediting the sum to the 1st defendants. In the journal of 1st defendants' firm 'havala' or transfer entries were made, debiting Rs. 50,000 to the suit partnership, and crediting the sum to Narandas Kedarnath. The 'havala' entries were admittedly made after Aso Sud 14, S. 1985 Maru (17th October 1929), but as of 24th June 1929. The plaintiffs contend that under these circumstances there was really no payment of the sum of Rs. 50,000 to the firm of Chimanram Motilal. They say that defendant 2 had no authority to receive the sum from 1st defendants and 1st defendants were aware of this limitation on the authority of defendant 2. They further say that the entries in the books were made in collusion between 1st defendants and defendant 2 who was at the same time a partner of the firm of Chimanram Motilal, the creditors of 1st defendants, and a partner of Narandas Kedarnath, the debtors of 1st defendants and that the payment is not binding on the firm of Chimanram Motilal, nor upon the plaintiffs as the partners of that firm.

This being the nature of the transaction, several important questions of law and fact arise for consideration. The very first question, in the forefront of the inquiry, is whether defendant 2 as the partner of a dissolved firm, viz., the firm of Chimanram Motilal could transfer the credit of Rs. 50,000 due to the firm by 1st defendants to the firm of Narandas Kedarnath, thereby making the latter firm the debtors instead of 1st defendant firm; and, if so, whether the transfer was properly and regularly made, or was tainted by fraud or collusion. It is provided under S. 263, Contract Act, 1872, which applies to this case, that the rights and obligations of a partner after dissolution of the partnership continue in all things 'necessary' for winding up the business of the partnership. Pollock and Mulla in their Commentaries on the Contract Act, Edn. 6, point out that this section was no doubt meant to express the English law on the subject, and that it should be read with sufficient emphasis on the word 'necessary.' The continuing authority of the partners for purposes of winding up is described in para. 1 in S. 47, Indian Partnership Act of 1932 as follows:

> After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

There is a proviso to the section with which we are not concerned. This section is based on S. 38, English Partnership Act. The only distinction between S. 263, Indian Contract Act and S. 47, Indian Partnership Act, is that instead of the words "the rights and obligations of the partners" we have a fuller expression, viz., "the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners." Both sections no doubt refer to the mutual rights and obligations of the partners after dissolution, and from the wording of S. 47 it seems that even the authority of a partner to bind the firm is one of the mutual rights and obligations of the partners in the winding up of the firm. It is therefore clear that though the dissolution of a firm causes a dissolution of the partnership between the partners, the partnership still subsists, but merely for the purpose of winding up its business and adjusting the rights of the partners inter se, and for this purpose the authority of the partners to bind the firm, and all their other mutual rights and obligations, continue notwithstanding the dissolution. The power of each partner however extends only so far as it is necessary to wind up the affairs of the firm and to complete transactions already begun. It has been held that if a debt is owing to a firm, payment by the debtor to any one of the partners extinguishes the claim of all the partners and discharges the debtor, even though a particular partner or a third person is appointed to collect the debts owing to the firm, and whether the debtor is aware of such appointment or not. Any partner of a dissolved firm can therefore recover payment of a debt due to the firm. He can effectually release the debtor and also give a valid receipt for the debt. But neither the release nor the receipt will be binding on his co-partners if the receipt is given, or the releasing partner acts in fraud of his co-partners and in collusion with the debtor: *see* (1839) 9 Ad & E 641,[1] (1811) 2 Camp 561[2] and 41 Mad 446.[3]

A partner can also accept a bill of exchange for a debt: (1829) 4 Car & P 108.[4] He has however no authority to acknowledge a debt, or by his act or admission to involve his co-partners in any new legal liability. Counsel for 1ts defendants thereupon contended that if a partner in a winding up can recover a debt due to the firm, he can also deal with it after recovery in any manner he pleases. That proposition however is subject to this qualification that the dealing in order to be binding on the co-partners must be 'necessary' in the winding up. It is pointed out in Lindley on Partnership, Edn. 9, at p. 195, that although a partner has power to receive payment of a debt and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment. Nor can he discharge a separate debt of his own by agreeing that it shall be set off against a debt due to the firm. It is of course open to the co-partners either to ratify the act of the partner which is

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1. Farrar v. Hutchinson, (1839) 9 Ad & E 641= 1 P & D 437=8 L J Q B 107.
2. Henderson and Smith v. Wild, (1811) 2 Camp 561.
3. Palaniappa Chettiar v. Veerappa Chettiar, A I R 1918 Mad 238 = 44 I C 466 = 41 Mad 446=34 M L J 41.
4. King v. Smith, (1829) 4 Car & P 108.

primarily not binding on them, or to acquiesce in it. But otherwise the act must be an act necessary in the winding up of the partnership.

It was also contended on behalf of 1st defendants that it was competent for a partner of a dissolved firm to transfer a debit balance due by the firm from one creditor to another, and that he could also transfer a credit balance due to the firm from one debtor to another, provided that in either case the transaction was not fraudulent nor collusive. Counsel relied principally on two old English cases. In (1857) 2 H & N 326[5] it was held that a partner had power to bind his co-partner by assenting to the transfer of a debt due to both of them in account with one bank to an account with another. That was however not the case of a dissolved firm; it was the case of a going concern. The other case is (1824) 4 Dowl & Ry 7,[6] in which *A* who was indebted to *B* & Co., was released by *B* & Co., on his assigning to *B* & Co., a debt due to him by *C* & Co. Notice of the assignment was given to a partner of *C* & Co., who promised to pay *B* & Co., the debt owing by *C* & Co., to *A*. *B* & Co., sued *C* & Co., for moneys had and received. *C* & Co., had been dissolved as to some of its members only, and in the course of the argument the Court doubted whether that was a dissolution of the partnership in the proper sense of the word. It was however held that a promise to pay made by one partner for and in the name of the rest, coupled with the declaration that a notice of the assignment to the other partners of *C* & Co., would have made no difference, was a perfectly good promise to bind the other partners. It was, therefore, argued that if a debit balance could be transferred by a partner, as in those two cases, why could not a partner transfer a credit balance, as in the present case? Counsel stated that this would follow from the propositions, that a partner could recover a debt in the winding up of his firm, that a debtor would be discharged if he paid the money to anyone of the partners, and that the partner who recovered the debt could deal with it in any manner he chose. It was also argued that each partner's agency, as described in S. 251, Contract Act, continued after dissolution, and could only be terminated, or any special agreement amongst them could be given effect to, by a suit in which either a receiver was appointed or an injunction granted restraining one partner from receiving money due to the firm. Counsel further contended that a partner of a dissolved firm could also effect a 'novatio' by substituting one debtor to the firm for another; and that is what has happened in this case. I think it is quite clear that the act done or transaction entered into by the partner of a dissolved firm must satisfy the main requirement of the law that it is an act or transaction which is 'necessary' in the winding up. The winding up only can be proceeded with after dissolution, and no other business can be carried on in the name of the firm. As pointed out by Halsbury, Vol. 22, para. 194:

> After dissolution, the partnership subsists merely for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners; and for these purposes, and these only, the authority, rights and obligations of the partners continue.

What was the nature of the transaction in this case? Defendant 2 as the partner of the firm of Chimanram Motilal, who were the creditors of 1st defendants, told Brijlal who represented 1st defendants to pay the sum of Rs. 50,000 to Chimanram Motilal, not in cash, but by appropriating the sum towards payment of a debt due to 1st defendants by the firm of Narandas Kedarnath in which he and defendant 3 and others were partners, but in which the plaintiffs had no concern, thereby making Narandas Kedarnath the debtors of Chimanram Motilal instead of 1st defendant firm. Could it be said that such a transaction was necessary in the winding up of the firm of Chimanram Motilal, and binding upon it and upon the plaintiffs who were its partners? It is nobody's case that all the partners of Chimanram Motilal, ratified the transaction afterwards or acquiesced in it. It was a transaction in which the duty of defendant 2, as partner of the creditor firm of Chimanram Motilal might have conflicted with his interest as a partner of the debtor firm of Narandas Kedarnath. He might have been interested in wiping off the liability of Narandas Kedarnath to 1st defendants, to the extent of Rs. 50,000, thereby allowing 1st defendants to wipe off their liability pro tanto to Chimanram Motilal, whereas his partners might not have been. The firm of Narandas Kedarnath had an account with 1st defendants, but there was no account of Chimanram Motilal and Narandas Kedarnath at the material dates in 1929. The partners of Chimanram Motilal had disputes inter se, and Brijlal representing 1st defendants knew, or at any rate had heard of the same.

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[5] Beale v. Caddick, (1857) 2 H & N 326=26 L J Ex 356.

[6] Lacy v. M'Neile, (1824) 4 Dowl & Ry 7.

It is true that there is no authority in point which lays down that knowledge of such disputes puts the debtor under any particular obligation not to pay the debt to one of the partners of the creditor firm. If knowledge of an agreement or arrangement among the partners of a dissolved firm not to call in the debts or that debts due to the firm should be paid to a particular partner or person only does not impose any such obligation, knowledge of disputes among the partners of the creditor firm may also not prevent the debtor making his payment, though it should put the bona fide debtor on his guard before making a payment. I do not think it can be said that a joint payment of a debt to all the partners or a joint receipt by the partners is strictly necessary. The statement of Lord Phillmore, in (1922) 1 A C 488,[7] viz., that if a debt is due to a firm, and both the ex-partners are alive, the debtor can only safely pay upon the receipt of both, does not really apply in this case. It was applicable only in the peculiar facts and circumstances of that case in which the partnership had been dissolved and all the accounts taken, and each partner had paid his share of the debts and received his share of the profits, and then it turned out afterwards that there was an item to the credit of the partnership which was either forgotten or treated as valueless, but afterwards became of value and fell in. In such a case a joint receipt would be necessary. But I do not think a joint receipt by the partners of a dissolved firm for a debt is ordinarily necessary in the winding up of a firm. The objection to the payment of Rs. 50,000 in this case is not that there was no joint receipt passed by all the partners of Chimanram Motilal. What is objected to is that defendant 2, by reason of his peculiar position as a partner of a creditor firm and a partner of a debtor firm at the same time, has acted in a manner which might be prejudicial to his co-partners and certainly not necessary in the winding up. He himself may have no objection to make Narandas Kedarnath the debtors of Chimanram Motilal instead of 1st defendants, but the other partners of Chimanram Motilal may have had such objection, and the plaintiffs did in fact object to the payment of the Rs. 50,000 in this manner after they had taken inspection of the relevant entries in the books.

In my opinion it is not a necessary act in the winding up of a dissolved firm for a partner to create a 'novatio' in respect of a debt owing to the firm. That is not recovering a debt, but really continuing it through somebody else as the debtor. His partners may previously consent to it or subsequently ratify or acquiesce in it; otherwise it is not binding upon them. But even assuming for the sake of argument that the making of a 'novatio' is a necessary act in the winding up, it will still not be binding upon the co-partners, if it is tainted by fraud or collusion. There is no fraud nor collusion charged in the plaint, though the plaintiffs had inspection of the books and the entries before taking out the originating summons. In the attorneys' correspondence which had previously ensued between the parties, the plaintiffs have alleged that 1st defendants in collusion with defendants 2, 3 and 4 have been putting off making up the partnership accounts in spite of the plaintiffs' repeated demands, but 1st defendants denied the charge. The plaintiffs, however, alleged in the objections brought in by them that the 'havala' entries in respect of the sum of Rs. 50,000 in the partnership books of account appear on the face of them to be collusive and made at a much later stage. Their counsel contended that the entries were made after the correspondence commenced on or about 29th October 1929. It is admitted that the 'havala' entry in 1st defendants' journal was not made on 24th June 1929, but was made sometime after 17th October 1929. The precise date on which it was made is uncertain according to Brijlal's evidence, but he stated that it was not made after Diwali, i.e. after 1st November 1929. It may be here pointed out that 1st defendants took nearly a week to reply to the plaintiffs' letter of 29th October 1929.

In his evidence, Brijlal stated that he had asked his clerk, Madanlal, to enter the 'havala', but Madanlal forgot to carry out his instructions, and that Madanlal must have possibly found out at Diwali or prior to it on making up the accounts that the 'havala' entry had not been made, and so he must have had made it up at the time. In his cross-examination, however, Brijlal's explanation was a little different. He said that Madanlal told him whilst comparing the accounts that he had omitted to enter the 'havala', and Brijlal told him that he could enter it even then. The entry in the journal of the suit partnership appears also on the last page, and it was suggested by plaintiffs' counsel that it was made at the same time as the 'havala' entry in the journal of 1st defendants. He particularly relied on Brijlal's answer in cross-examination that until the 'havala' entry was actually made in October, though as of June 1929, no entry was made anywhere in any of the books of 1st defendant firm in respect of this sum of Rs. 50,000. At the same time it is clear that in or about June 1929, all the sale proceeds of the mills had been realised, and there is an entry under date, 26th June, on the same page showing the last balance of the sale proceeds that were realised. I am constrained to say that the entries are not altogether free from doubt, but, as it has always been held, suspicion is not proof of fraud.

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[7] Gopala Chetty v. Vijayaraghavachariar, A I R 1922 P C 115=(1922) 1 A C 488=91 L J P C 233=127 L T 192=38 T L R 442=74 I C 621=49 I A 181=45 Mad 378 (P C).

There are, however, other surrounding circumstances which the Court has to consider in arriving at its conclusion. At all material dates in dispute the firm of Chimanram Motilal had no account with the firm of Narandas Kedarnath, nor had Narandas Kedarnath any account with Chimanram Motilal. For all practical purposes Narandas Kedarnath were strangers to Chimanram Motilal. Narandas Kedarnath had an account with 1st defendants and it seems moneys were owing to the 1st defendants in that account. Plaintiffs' counsel suggested in his cross-examination of Brijlal that apart from monetary dealings between the two firms 1st defendants were also partners in the firm of Narandas Kedarnath or were interested in Narandas Kedarnath. This was denied by Brijlal, and all that the plaintiffs' witness, Dwarkadas Bhimraj, the son of plaintiff 2, could say was that it appeared that 1st defendants were partners with Narandas Kedarnath. Later on in his cross-examination he said that 1st defendants had a share in the firm of Narandas Kedarnath and that he had once asked Joharmal, the chief partner in 1st defendant firm, about it, and Joharmal had said that that was so. The evidence on this point, however, is not conclusive, and I cannot, therefore, hold that 1st defendant firm had share in the firm of Narandas Kedarnath. Defendants 2 and 3, however, who are brothers, are related to Joharmal. I have already stated before that defendant 2 was at the time a common partner of the firm of Chimanram Motilal and the firm of Narandas Kedarnath, and as a partner of Narandas Kedarnath he might have been interested, and probably was interested, in the "novatio", whereas the plaintiffs were not.

He was present all the time at the hearing on the reference before the Commissioner, but he was not called as a witness nor did he give evidence on his own behalf. The only witness called on behalf of 1ts defendants was Brijlal. It is difficult to understand why it was thought necessary to call only one party to the agreement and not the other, when the latter was really the man who had first moved in the matter and knew all about the transaction : *see* 29 Bom L R 1392.[8] Counsel for 1st defendants argued that the onus of proving fraud or collusion, which is akin to fraud, was on the plaintiffs, and that they had failed to prove it, and that therefore it was not necessary to call defendant 2. It was, however, for 1st defendants not only to prove the transaction, but to show that it was perfectly bona fide. There should be sufficient and cogent proof of the "novatio". Brijlal only stated that defendant 2 asked him to transfer the sum of Rs. 50,000 from the account of Chimanram Motilal to Narandas Kedarnath, and he did so. The name of defendant 2 does not appear in any of the entries. The books of Narandas Kedarnath were not put in. Corresponding entries were probably made in the books of Narandas Kedarnath, but they were not proved. The evidence on the record is, in my opinion, incomplete. It also appears that defendants 2, 3 and 4 are not on good terms with the plaintiffs. In fact they refused to join the plaintiffs in the originating summons, and were, therefore, impleaded as party defendants.

Taking all these circumstances into consideration I am not satisfied that this transaction is above board. I am inclined to hold that it was entered into in collusion between 1st defendant firm and defendant 2. Counsel for1st defendants argued that the firm had in no way benefited by the transaction. I am not so sure of that. There is no evidence as to the financial position of the firm of Narandas Kedarnath, and their account with 1st defendants was closed in or about October 1930. The 1st defendants got rid of their liability to pay Rs. 50,000 to the firm of Chimanram Motilal, and by crediting the amount to Narandas Kedarnath diminished to that extent the liability of Narandas Kedarnath who may or may not have been in a position to pay off the entire amount due by them to 1st defendants. Counsel further argued that it would be a great hardship now to hold 1st defendants liable for the sum, as their claim against Narandas Kedarnath was barred. But that in itself is no argument, if the transaction is not binding on all the partners of Chimanram Motilal. The 1st defendants knew very well when the originating summons was taken out that plaintiffs disputed the payment of the sum of Rupees 50,000 by 1st defendants in the manner in which it was paid.

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[8] Gurbaksh Singh v. Gurdial Singh, A I R 1927 P C 230=105 I C 220=29 Bom L R 1392 (P C).

They could have then adopted such proceedings as they might have been advised to take against Narandas Kedarnath, but they chose not to do so. In my opinion the learned Commissioner was right in holding that defendant 2 could not bind his co-partners by allowing moneys due by one firm to be paid by another firm with which his other partners except his brother defendant 3 had no concern. I therefore hold that the alleged payment of Rs. 50,000 does not in law amount to a payment to the firm of Chimanram Motilal, and therefore exceps. 1 to 6 filed by 1st defendant firm must be dismissed. I will deal with exceps. 7 and 8 later. The exceptions filed by the plaintiffs are referable to surcharges 3 and 4 of the surcharges brought in by them. Surcharge 4 is consequential upon surcharge 3. The plaintiffs have surcharged the sum of Rs. 1,75,558-0-3, being the amount of interest payable to Messrs. Chimanram Motilal on their capital account at the rate of seven and a half per cent up to 11th October 1934, and further interest from 12th October 1934 till payment. 12th October is the date of the decretal order of reference to the Commissioner. The ground of the surcharge is stated as follows :

> As regards the capital account it was agreed that interest was to be charged at the rate of seven and a half per cent with yearly rests, and accordingly interest was charged at the end of the year 1926.

The learned Commissioner came to the conclusion that in making up the accounts no interest should be allowed to either party after the date of the dissolution of the suit partnership, and he directed that the accounts should be made up on that basis. At the third meeting before the Commissioner, held on 25th February 1935, Mr. Munshi on behalf of 1st defendants made a statement which the learned Commissioner has taken down as follows :

> A note may be taken that we are agreed that interest and the capital account is to be calculated at seven and a half per cent and on the current account at four per cent.

Counsel on behalf of plaintiffs and also on behalf of defendants 2, 3 and 4 agreed. Thereafter the surcharges were discussed. Mr. Amin on behalf of the plaintiffs said as follows :

> Surcharges 2, 3 and 4 will depend on the finding on the item of Rs. 50,000, and after it is decided items of interest will be adjusted, there being no dispute as to the rate of interest.

Mr. Lalji on behalf of defendants 2, 3 and 4 said that the statement was correct, and Mr. Munshi on behalf of 1st defendants stated : "I agree." He further stated that only objection 2, viz., the objection as to the sum of Rs. 50,000, remained to be determined. The objection was then gone into. Evidence was led on behalf of the parties, and the Commissioner gave his judgment on 11th March 1935. Thereafter there was considerable discussion as to what Mr. Munshi meant when he stated on 25th February 1935 "I agree," and the learned Commissioner found that counsel had not applied his mind to the question whether in law interest could run as against 1st defendants after the date of dissolution, and was only considering the question as to the rate of interest, and the question whether interest should be simple or compound with periodical rests. He held that the statement could not be used as an admission binding on 1st defendants. Plaintiffs, on the other hand, contend that the learned Commissioner ought to have held that it was admitted on behalf of 1st defendants that interest was agreed to be paid in the capital account at the rate of seven and a half per cent per annum with yearly rests up to the date of payment, and that only the amount of the said interest was to be affected according as the objection to the item of Rs. 50,000 was allowed or disallowed. It was also argued that the admission made by counsel was one of fact, and that his clients, 1st defendants, were bound by it. Mr. Munshi stated to the Commissioner, and also said it to the Court, that when he said that he agreed he said so under some misapprehension, and that the Court would not hold his clients bound by it. He said it never occurred to him that what he "agreed" to would be construed to apply to a matter which involved as big a sum as Rs. 1,75,000 odd. On the other hand Mr. Amin stated that there was no misapprehension, that the admission was or must be presumed to have been made on instructions, and that counsel could not go behind it.

In order to show that there was no room for misapprehension he wanted to tender the partnership account filed by 1st defendants before the arbitrator Mr. Taraporewala in which it is alleged that 1st defendants had themselves charged interest on their capital account at the rate of seven and a half per cent with yearly rests up to the date of payment. The learned Commissioner, however, rejected the application as being irrelevant, and in my opinion rightly. I do not think that the admission was merely an admission of fact. It has been well established that in the absence of an express agreement no interest would run on the capital account of each partner after dissolution. Such an agreement may either be express or it may be inferred if the partners have themselves been in the habit of charging such interest in their accounts. A stipulation that interest should be allowed on the capitals of the partners may be presumed from the usage of those who carried on the partnership business. But where interest on capital is payable, it stops running at the date of dissolution, unless otherwise agreed : *see* (1872) 8 Ch 1,[9] practically overruling the decision in (1865) 3 De G J & S 162.[10] I do not think counsel intended to give up this contention of law with regard to a very large sum of interest, and when he said that items of interest would be adjusted, the rate being admitted to be seven and a half per cent. I do not think he intended to mean that the items were merely to be worked out arithmetically without further argument. Secondly, counsel seems to have inadvertently expressed himself in a way as to make his agreement far more extensive than he thought or meant it to be. Even if it is held that the admission is one purely of fact, which I doubt, 1st defendants are not bound if it was made under a misapprehension : *see* (1895) 2 Ch 638.[11] It was not a case, as Kekewich, J. pointed out in his judgment, which was overruled by the appeal Court, where counsel miscalculated the pecuniary value of his concession or took any chance.

The amount of interest was assessed and is clearly mentioned in the surcharge, so that there was no chance of any miscalculation. If there was misapprehension, as counsel says there was, I do not see any reason why a Court should be deprived of its general authority to do justice between the parties, either on account of an unauthorised act of counsel, or an admission which was inadvertently made. I, therefore, hold that 1st defendants are not precluded from raising the legal contention whether any interest could be allowed on the capitals after the date of dissolution in the taking of the accounts.

The next question is whether the plaintiffs should have been allowed to lead evidence to prove the agreement mentioned in the ground of surcharge No. 3, viz., that interest was to be charged at the rate of seven and a half per cent with yearly rests on the capital amount. The 1st defendants' counsel argued that in the first place the agreement was not clearly stated, and, secondly, that it had not been expressly pleaded in the plaint, nor referred to in any other document or correspondence before, and there was no direction to the Commissioner to take the partnership accounts on the basis of the alleged agreement. I do not agree with the contention that the agreement has not been clearly stated. The agreement as stated is that interest was to be charged at the rate of seven and a half per cent with yearly rests on the capitals, and in accordance with that agreement interest was charged at the said rate until the end of 1926, i. e., before the dissolution of the partnership. It cannot be said that interest was actually charged at that rate on the capital account before dissolution, because the agreement was to charge it only up till the date of dissolution and not thereafter.

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[9] Barfield v. Loughborough, (1872) 8 Ch 1=42 L J Ch 179=27 L T 499=21 W R 86.

[10] Pilling v. Pilling, (1865) 3 De G J & S 162.

[11] Hickman v. Berens, (1895) 2 Ch 638=12 R. 602=64 L J Ch 785=73 L T 323.

The next question is whether the plaintiffs should have been allowed to lead evidence to prove the express agreement before the Commissioner, and whether they should be allowed to prove the same even at this stage in Court. It is true that it has not been pleaded. If it had been pleaded it would ordinarily have had to be proved in Court, and not before the Commissioner. A reference to the Commissioner to take the accounts on the footing of such an agreement, if and when proved before the Commissioner, would be outside the scope of S. 75 and O. 26, Civil P. C. In a suit for dissolution of partnership and the taking of partnership accounts the Court usually passes a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership stands, or is deemed to have been, dissolved, and directing such accounts to be taken and other acts to be done as it thinks fit under the provisions of O. 20, R. 15 of the Code.

The Commissioner has no power to decide questions relating to the terms of the partnership, its duration, or the shares of the partners. He is bound by the terms of the decretal order of reference, and under the decretal order of reference dated 12th October the suit was referred to him to take an account of all the dealings and transactions among the partners of the suit partnership and to ascertain and report what balance, if any, was due from or by one of the partners to the other after making all just allowances. No other specific direction was given, and counsel for the plaintiffs contended that the Commissioner was not precluded from going into the question of this agreement. He argued that the decree had no reference whatever to the mode in which accounts were to be taken, and this was a question which properly arose upon the taking of the accounts. He relied on the observations of Turner, L. J., in the case which I have already referred to before in *Pilling* v. *Pilling*.[10] I do not agree that this is merely a question as to the mode of taking accounts.

The question which arose in that suit, viz., whether accounts ought to be taken according to the books of account or according to the articles of partnership, was such a question. But the proof of an agreement, which forms an exception to the general rule of law, that no interest is to be allowed in the capital account after dissolution, is not a matter concerning the mode of taking accounts. I do not also agree with the contention of counsel for 1st defendants that the decretal order of reference operates as res judicata on all points not dealt with by it, on the analogy of Expln. 5 to S. 11, Civil P. C., which provides that any relief claimed in the plaint which is not expressly granted by the decree shall be deemed to have been refused. No relief in the plaint on this originating summons was claimed on the basis of the agreement put forward by the plaintiffs at the hearing before the Commissioner, and it therefore cannot be said that it must be deemed to have been refused.

The mere fact that interest on a particular basis was not claimed in the pleadings should not preclude the plaintiffs from proving the same, even at this stage, in order to enable the Court to determine all the questions in controversy between the parties, before the final decree is passed. The amount involved is a very large one, and I think I should in fairness to the plaintiffs allow them to lead evidence in Court to prove the alleged agreement, viz., that interest was to be charged at the rate of seven and a half per cent per annum with yearly rests on the amount standing to the credit of the capital account of the partners till payment. I reserve the costs of and incidental to this further inquiry. I may here refer to the judgment of the Privy Council in 42 I A 91,[12] in which the report of the Assistant Referee showed that large sums, forming part of the assets, were in the hands of the appellants, and had been used by them in continuing the business of the partnership after dissolution for their own benefit. Interest was not claimed in the plaint, but was allowed on the principle of law stated in the judgment. In the result, exceptions 3 to 9 filed on behalf of the plaintiffs must be dismissed. The remaining exceptions filed on their behalf, and exceptions 7 and 8 filed on behalf of 1st defendants, will stand over until the determination of the question relating to the alleged agreement.

10th December.—The remaining exceptions came on for hearing again for the determination of certain questions which remained to be considered. The questions are: (1) Whether there was an agreement as alleged between the two partners of the suit partnership that interest was to be charged at the rate of seven and a half per cent per annum with yearly rests on the amount standing to the credit of the capital account of each of the partners from the date of its dissolution until payment; (2) whether interest is payable on the capital amounts of the partners before and up to the date of dissolution; and (3) whether the plaintiffs are entitled to interest on the sum of Rs. 50,000 which, as I have held, was not a proper and legal payment to the firm of Chimanram Motilal, and, if so, at what rate, and from what date? There was no specific provision in the Contract Act for payment of interest to partners in their capital accounts. It is, however, pointed out in Lindley on Partnership, Edn. 10, p. 465, that partners are not entitled to interest on their respective capitals unless there is some agreement to that effect, and that such an agreement may be inferred if they have themselves been in the habit of charging such interest in their accounts. Later on, on the same page, it is stated that where interest on capital is payable, the interest stops at the date of dissolution unless otherwise agreed. In this connexion I may also refer to the observations of Lord Selborne, L. C., in *Barfield* v. *Loughborough*[9] that, (p. 3):

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[12] Ahmed Musaji Saleji v. Hashim Ebrahim Saleji, A I R 1915 P C 116=28 I C 710=42 I A 91=42 Cal 914 (P C).

> A claim to have partnership accounts, subsequent to the dissolution of a partnership, taken with interest as between the partners, must (in the absence of any facts raising particular equities) be maintained, if at all, upon the footing of an agreement to that effect.

The agreement alleged by the plaintiffs in the case before me is that interest was to be charged on the amount standing to the credit of the capital accounts of the partners at seven and a half per cent per annum with yearly rests. Plaintiffs' counsel at the resumed hearing stated that the agreement was to pay interest "irrespective of profit or loss." Those words "irrespective of profit or loss," were not in the agreement mentioned to me. The plaintiffs, therefore, have to prove the agreement as originally alleged, and the onus of proving it is on them. At this hearing only the plaintiffs and 1st defendant firm appeared through their respective counsel. Defendants 2, 3 and 4 have not appeared. Two witnesses were examined on behalf of the plaintiffs with regard to the alleged agreement for payment of interest after dissolution, viz., plaintiff 1. Motilal Chimanram, and Dwarkadas Bhimraj, the son of plaintiff 2. Plaintiff 1 was the senior and principal partner of the firm of Chimanram Motilal until its dissolution. He said that the flour mills in question were first purchased in 1925 in partnership between his firm of Chimanram Motilal and Basantlal Gorakhram and Hansraj Kanji, and that the shares of those three partners were six annas, six annas, and four annas in the rupee respectively. That partnership, which I will call the old partnership, continued till about 24th October 1926, when owing to some disputes between Motilal and Basantlal Gorakhram it was dissolved. Before dissolution, however, it was suggested by the partners that the mills should be put up for sale by private auction, and pending the sale there were negotiations between plaintiff 1, representing the firm of Chimanram Motilal, and one Joharmal Sarupchand, representing 1st defendant firm, to form a new partnership which would purchase and work the mills. There was an interview about two or three days before the auction was held at which plaintiff 1 and Joharmal were present. The interview was at the "pedhi" of Chimanram Motilal. Defendant 2, Narandas Pokermal, was also present. In fact defendant 2, was the person who was sent by plaintiff 1 to fetch Joharmal for the interview. Plaintiff 1 said that Dwarkadas Bhimraj was also present at the interview. Joharmal could not remember whether Dwarkadas was or was not present, but defendant 2 was positive that he was not. There is no dispute that a new partnership was formed between the firm of Chimanram Motilal and the firm of Sarupchand Prithiraj, and that the shares of the new partners were fixed at ten annas and six annas in the rupee respectively.

It is also admitted that there was a talk about the capital to be brought in by the new partners, and Joharmal agreed that his firm of Sarupchand Prithiraj would bring in about three to four lacs of rupees, and the rest would be brought in by the firm of Chimanram Motilal for the working of the mills. There was also a talk about the payment of interest on the capital to be brought in by the partners, and it was agreed that interest was to be paid at the rate of ten annas per cent per mensem with yearly rests. So far there is no dispute.

Joharmal, however, alleged that he told plaintiff 1 that the partners of his firm would not be able to attend to the business of the suit partnership, and that Brijlal Ramjidas would be the real partner and attend to the business. Defendant 2 who gave evidence on behalf of 1st defendant firm has corroborated Joharmal in that statement. Brijlal Ramjidas was also called, and though he was not present at the interview, he said that he was also subsequently informed by Joharmal to the same effect. On the other hand, plaintiff 1 denied that it was stated that Brijlal was to be the real partner. According to him all that Joharmal said was that the business of the suit partnership would be looked after both by Joharmal himself and by Brijlal. With regard to the payment of interest on capital, plaintiff 1 stated that Joharmal asked him what was the condition as to payment of interest on the capitals in the old partnership, and he told Joharmal that it had been agreed that interest was to be paid at seven and a half per cent with yearly rests, irrespective of profit or loss, and whether the mills worked or not, to which, according to him, Joharmal agreed in relation to the suit partnership. The next witness, Dwarkadas Bhimraj, stated in his examination-in-chief that plaintiff 1 told Joharmal that interest would be paid at that rate on the capital amounts irrespective of profit or loss, and whether the mills worked or not, and after dissolution until payment. In his cross-examination he first omitted those words "after dissolution until payment," but later on he mentioned that interest was to be paid till payment. Joharmal and defendant 2 deny that there was any such agreement, and as I have stated before, defendant 2 even denies that Dwarkadas was present at the interview. According to defendant 2, the arrangement between the partners of the old partnership was that interest was to be paid on the capitals only if the mills fetched a price of over rupees eight lacs at the auction, as that was the sum which was invested by the old partnership in the mills. If the mills fetched less, interest was to be paid, but the loss was to be recovered from the partners. That is why he said, entries calculating interest were made in the capital accounts of the partners. It appears that there was a loss of about Rs. 85,000 on the auction sale, and the entry showing the loss has been put in, but the other entries showing how interest was calculated in the capital accounts of the old partners are not relevant for proving that there was also an agreement for payment of interest in the capital accounts of the partners of the suit partnership.

The oral evidence so far as it goes is not, in my opinion, conclusive on the question of the agreement alleged by the plaintiffs. It must be remembered that witnesses were deposing from memory in 1935 to conversations which took place as far back as 1926, and I do not accept the evidence either of plaintiff 1 or Dwarkadas on the question of the alleged agreement. It is also not clear what occasion there was to discuss the question of the dissolution of the suit partnership even before it had commenced. The plaintiffs' counsel argued that the question of payment of interest on capital in the event of there being a loss must have arisen because the old partnership had resulted in a loss of Rs. 85,000. On the other hand, it is also clear that the exact loss was not ascertained until after the auction was held, and the interview at which the suit partnership was formed was before the auction. Assuming even that there was an occasion to discuss the question of the payment of interest on dissolution in the event of the partnership resulting in a loss, it does not necessarily follow that any agreement was actually arrived at. Apart from the oral evidence however there is certain documentary evidence on which the plaintiffs rely. Admittedly there were three sets of books of account, one kept by the firm of Chimanram Motilal, one kept by 1st defendant firm of Sarupchand Pithiraj, and the third, being the books of the suit partnership, which were also kept by 1st defendant firm. The books of Chimanram Motilal are not before the Court. That firm was dissolved in June 1927, and the books were handed over to the arbitrator, Mr. Bagdi, to whom the disputes of the partners of Chimanram Motilal inter se were referred.

It was argued that there could be no entries of interest on the capital account in the books kept by Chimanram Motilal as the firm was dissolved before the year was out. Probably there were none; but in the absence of the books, the Court cannot express any opinion definitely whether there were none, nor whether any entries were made subsequently, that is, after the dissolution of that firm. Plaintiffs however rely on the entries in the 1st defendants' books which show that interest was calculated at ten annas per cent per mensem with yearly rests in their own capital account. The accounts for the years 1926-27, 1927-28, 1928-29, 1929-30 have been put in, and the accounts for 1927-28 and 1928-29 show that interest was calculated in the capital account after the dissolution of the suit partnership in November 1927. Joharmal was asked to explain those entries. He said he knew nothing about the account books, that he did not attend to the business of the suit partnership, and that the entries might have been made by mistake. Brijlal Ramjidas said that his father was a partner in the firm of Sarupchand Prithiraj in 1926 and is so even now, and that he became a partner in his own right only in 1930-31, though throughout he and his father have been joint.

He further stated that Joharmal informed him that he was to be the real partner in the suit partnership, and that he acted as such, though it was the 1st defendant firm which financed him for purposes of carrying on the business of the suit partnership. This was the contention at first put forward by 1st defendant firm when the originating summons came on for hearing before Rangnekar, J., but eventually they gave it up, and it is conceded that the questions as to whether 1st defendants were the partners or whether Brijlal Ramjidas was the partner cannot be re-agitated now. It may be that there was evidence supporting either of these points of view, but with that I am not now concerned. Counsel for 1st defendant firm however argued that interest was calculated in the capital account of 1st defendants in their books, because 1st defendant firm acted on the supposition, since found to be untenable and given up, that Brijlal was the real partner, and that they were advancing moneys to him on which he would have to pay interest to them. I agree with plaintiffs' counsel that if Brijlal was the real partner, and 1st defendant firm only financed him for the purposes of the business, the entries would not have been made in the way they have been made. At the same time there is some evidence to show that Brijlal attended to the business and signed cheques as a partner, and even filed a suit against the firm of Chimanram Motilal as such partner. He also stated that he was liable to pay interest to 1st defendant firm, but that he had not paid, as accounts were not made up. If the matter had stood there, it would have been difficult to accept this explanation.

But there are books of the suit partnership, also written up and maintained by 1st defendant firm, and it is significant that in those books no interest is calculated either in the account of Chimanram Motilal or in the account of 1st defendants as partners of the suit partnership. The resulting position is therefore somewhat curious. In 1st defendants' own books interest is calculated for the reason suggested, whereas in the books of the suit partnership, also kept by 1st defendants interest is not calculated in the capital accounts, and I have not got any satisfactory explanation for the difference in the entries in the two sets of books. It is further significant that such an important agreement as the one now alleged should not have been recorded anywhere by the parties all these years. It is not even mentioned in the plaint. It was mentioned for the first time in the surcharges filed by the plaintiffs, and I allowed the plaintiffs an opportunity to prove the agreement, considering its importance to them, and in order that all the disputes between the parties may be adjudicated by the Court before the final decree. Taking the whole of the oral evidence and the documentary evidence, and reading it together, I am unable to hold that the onus which lay on the plaintiffs has been discharged, and therefore, in my opinion, the partners are not entitled to any interest on their capitals after the dissolution of the partnership.

The next question is, whether the plaintiffs are entitled to interest on their capital accounts before and up to dissolution, and, if so, out of what is the interest to be paid? The law on the subject was codified in England in the Partnership Act of 1890, and in India under the Indian Partnership Act of 1932. Counsel for 1st defendant firm relied on a statement of the law in (1867) 2 Ch 250.[13] In that case there was a written agreement between the partners under which each of the two partners was to have interest at five per cent on the capitals, and the profits were after deduction of interest to be then equally divided between the partners. The partnership was dissolved and the joint trade between the partners thereupon came to an end. It was pointed out by Lord Chelmsford, L. C., at p. 253, that as the partnership articles were out of question, there was no longer an existing agreement for payment of interest upon the capital of the partners, and he adds: "Indeed, as I have already shown, there are no profits of the trade, in the proper meaning of those words, from which interest could be deducted." There is no doubt that as far as capital is concerned, viz., the contribution which each partner makes for commencing or carrying on the partnership business, he has no right to sue to recover it, and he can only get back his capital on dissolution of the partnership out of any surplus assets that may remain over after payment of the liabilities. If he cannot recover his contribution until the liabilities are first paid off, he is equally not entitled to recover interest on that capital. He can recover such interest if there is either an express agreement between the partners, or there is an agreement which can be implied from the usage of their trade or from the practice of their firm. Under S. 24 (4), English Partnership Act of 1890 a partner is not entitled before the ascertainment of profits to interest on the capital subscribed by him. This is subject to any agreement, express or implied, between the partners. The wording of S. 13 (c), Indian Partnership Act, is somewhat different, for it is there provided that subject to contract between the partners where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits. This is a more explicit statement of the law, though neither the English Act nor the Indian Act is applicable to the case before me. The principle, however, of the common law which is applicable is that any agreed interest on the capital brought in by a partner into the business is, unless the contrary is clearly expressed, a payment in lieu or on account of profits, and accordingly chargeable to profits only.

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[13] Watney v. Wells, (1867) 2 Ch 250=36 L J Ch 861=16 L T 248=15 W R 621.

It is, therefore, necessary for the plaintiffs to prove in the first place that there was an express or implied agreement that interest was to be paid on the capitals before and up to dissolution. The plaintiffs' counsel relied on the evidence of Joharmal that he asked plaintiff 1 about payment of interest on the capital, and plaintiff 1 replied that interest would be paid by the firm at ten annas per cent per mensem. He argued that this amounted to an absolute and unqualified agreement to pay interest on the capital amounts irrespective of profit or loss. I do not agree with that contention. Counsel next argued that such an agreement would also be implied by reason of the fact that interest on the capital accounts of the two partners has been calculated up to the end of 1926, that is for about two months after the commencement of the suit partnership. That interest has been so charged is admitted, though the amount of interest charged in the account of the firm of Chimanram Motilal is for a much longer period than the interest calculated for 1st defendant firm. The interest calculated in the account of the firm of Chimanram Motilal begins with 1st January 1926, that is long before the commencement of the suit partnership, because the firm of Chimanram Motilal was also a partner in the old partnership. Those entries were, however, made at a time when there was no ascertainment of profit or loss in the suit partnership, and no evidence has been led to show why the entries were made. Plaintiffs' counsel further relied on the calculation of interest made by 1st defendant firm in their own books of account prior to dissolution; but I have already referred to this when dealing with Brijlal's explanation of the books. I cannot, therefore, spell out from the entries by themselves any implied agreement to pay interest in the capital accounts before dissolution.

It was next argued that 1st defendants were precluded from contending that the plaintiffs were not entitled to such interest by reason of certain statements made by their counsel before the learned Commissioner. On 25th February 1935, the Commissioner took a note that Mr. Munshi, counsel for 1st defendants, stated that parties were agreed that interest on capital account was to be calculated at seven and a half per cent and on the current account at four per cent. On 11th March 1935, there is a further statement made by Mr. Munshi, and taken down by the Commissioner as follows: "Up to date of dissolution we agree that interest should be on the basis of yearly rests." This makes the earlier statement of 25th February clear that the seven and a half per cent was to be calculated with yearly rests; but the question is whether Mr. Munshi on behalf of 1st defendants agreed that interest was to be calculated at that rate, even though the suit partnership had resulted in a loss. No doubt the partners knew that the business had resulted in a loss, and Brijlal Ramjidas has admitted it before the Commissioner. But in the absence of any clear note to that effect by the learned Commissioner I cannot take it that counsel meant that interest was to be calculated at that rate irrespective of loss, merely because it was known that the partnership had resulted in a loss. It appears from exception 7 that the Commissioner understood Mr. Munshi to mean that 1st defendants had agreed that the interest should be paid otherwise than out of the profits. The Commissioner has not taken any note of the argument on the subject, and in neither of his two judgments has he referred to this point, nor given any reason why he held that it was agreed that interest should be paid otherwise than out of profits. There being no express or implied agreement, as I have held, the parties must fall back upon the legal position that partners are not entitled to interest on the capital accounts even before dissolution unless there are profits.

The third and the last question is, whether the firm of Chimanram Motilal is entitled to interest on the sum of Rs. 50,000, and, if so, at what rate, and from what date. I have already dealt with this sum in my earlier judgment, and I have held that it was not a proper and legal payment by 1st defendant firm to the firm of Chimanram Motilal, and that the entries relating to this payment were made by collusion between defendant 2 and 1st defendant firm. It was argued on behalf of 1st defendants that they were not liable to pay interest on this amount, as there was no demand made by the firm of Chimanram Motilal for the same. It is, however, in evidence that a demand was made for payment of a sum of Rs. 60,000 to Rs. 65,000 as and when further sale proceeds of the mills had come in, but the amount was to be paid later when the sale was completed. There was a demand, but in my opinion payment was made, in the manner in which it was made by collusion. The 1st defendants are, therefore, liable to pay interest on that sum by reason of their collusive or fraudulent dealing with it. It is a sum which, in my opinion, was falsely kept back by 1st defendants from the firm of Chimanram Motilal. I do not think that it is a case in which the principle laid down in 57 I A 245[14] applies, viz., that until the accounts are taken it is impossible to say what, if anything, is due from one partner to his co-partners. The question is not one of taking of accounts, but of wrongfully withholding payment of a particular sum of the use of which the firm of Chimanram Motilal has been deprived. They were deprived according to me from the date when the 'havala' entries were made, and I direct that in making up the accounts the 1st defendant firm should account to the firm of Chimanram Motilal for this sum with simple interest at six per cent per annum from 24th June 1929, till judgment with further interest at six per cent per annum till payment.

The Commissioner's report will therefore have to be varied and the figures worked out on the basis of my findings on these exceptions, viz., on the basis that 1st defendants are liable to account for the sum of Rs. 50,000 with interest as aforesaid, but that no interest is to be calculated on the capital accounts of the partners from and after 1st January 1927, until dissolution and also after dissolution. The exceptions will be put down for further hearing and for argument of costs on Friday next, 13th December 1935.

11th March 1936.—In the second part of my judgment on the hearing of these exceptions delivered on 10th December 1935, I held that in making up the final accounts 1st defendant firm should account for the sum of Rs. 50,000 to the firm of Chimanram Motilal with simple interest, and that the Commissioner's report would have to be varied on the basis of my findings on the exceptions. The exceptions were ordered to be put down for further hearing and for argument of costs before me, and they have come up for hearing to-day. The first question that was argued was whether the sum of Rs. 50,000 and the interest thereon were to be paid to the suit partnership consisting of the firm of Chimanram Motilal and 1st defendant firm of Sarupchand Prithiraj, or whether they were to be paid to the firm of

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[14] Suleman v. Abdul Latif, A I R 1930 P C 185 =124 I C 891=57 I A 245=58 Cal 208 (P C).

Chimanram Motilal. According to my judgment both the sum and the interest are to be paid to the firm of Chimanram Motilal. Counsel for the plaintiffs stated that interest on Rs. 50,000 calculated from 24th June 1929, till 10th February 1936, worked out at Rs. 19,900, but the exact figure of interest up to date is to be mentioned later. It appears from the report of the Commissioner, dated 14th March 1935, that on that date a sum of Rs. 18,500 belonging to the suit partnership was in the hands of their attorneys Messrs. Mulla & Mulla. That amount, I understand, has been invested, and the exact amount in their hands with the interest accrued due thereon is also to be mentioned later. The original figures mentioned in the Commissioner's report will have to be varied accordingly.

The only remaining question is one of costs on which I have heard counsel. The costs are to be dealt with under different heads, viz., (a) the general costs of the action before the decretal order of reference; (b) the costs of defendants 2, 3 and 4 of the issue tried before Rangnekar, J., viz., whether 1st defendants were a partner in the suit partnership or only Brijlal Ramjidas as alleged by 1st defendants; (c) the costs of the reference before the Commissioner; and (d) the costs of the hearing of the exceptions in Court. With regard to the general costs of the action the costs of all parties must come out of the partnership assets, as all the partners were entitled to appear on the originating summons. The costs of the issue tried by Rangnekar, J., so far as the plaintiffs and 1st defendant firm are concerned, have already been dealt with by the learned Judge who found the issue against 1st defendants. The costs of defendants 2, 3 and 4 have been reserved, and I will deal with the same later. With regard to the costs of the reference there is no doubt that the time before the Commissioner was almost entirely occupied by consideration of the question whether the payment of Rs. 50,000 by 1st defendant firm to defendant 2 was proper. There was some argument before the Commissioner as to the admission made by Mr. Munshi, counsel for 1st defendants, with regard to the payment of interest on capitals after dissolution. But, as I have said before, the entire hearing before the Commissioner related to the question of the payment of Rs. 50,000, evidence was laid on both sides, and the matter was decided by the Commissioner in favour of the plaintiffs. I have also decided the same question on the hearing of these exceptions in favour of the plaintiffs, and I therefore direct 1st defendants to pay all the plaintiffs' costs of the reference before the Commissioner.

With regard to the costs of the exceptions there is a certain amount of difficulty because there are various exceptions filed on behalf of the plaintiffs and also on behalf of 1st defendants, and my findings have not been entirely for the one side or the other. I have held on the first six exceptions filed by 1st defendants that the payment of Rs. 50,000 was wrongful and that those exceptions must be dismissed. With regard to exceptions 7 and 8, 1st defendants have substantially succeeded, except that I have allowed interest on the capitals up to 1st January 1927, as appearing in the books of account. The question relating to the payment of Rs. 50,000 was contested at great length before me, and on my finding in favour of the plaintiffs I direct 1st defendants to pay seven-eighths of the plaintiffs' costs of the hearing of those exceptions. With regard to the remaining one-eighth of those costs I make no order. With regard to the exceptions filed on behalf of the plaintiffs I have held that exceptions 3 to 9 should be dismissed. I have also held on exceptions 1 and 2 against them. As to exceptions 12, 13 and 14 which go along with exception 12, the firm of Chimanram Motilal are entitled to interest on the sum of Rupees 50,000 as stated before. Exceptions 15 and 16 must be dismissed. With regard to exceptions 10 and 11 filed on behalf of the plaintiffs, I allowed the plaintiffs to prove the agreement alleged by them. A considerable amount of evidence was led on the question of this agreement, and I held that the onus had not been discharged by the plaintiffs and that they had failed to prove the agreement. I therefore direct the plaintiffs to pay three-fourths of 1st defendants' costs of the hearing of the plaintiffs' exceptions excluding exceptions 10 and 11.

I make no order as to the remaining one-fourth costs of those exceptions. As to the costs of exceptions 10 and 11 and the costs of the issue as to the alleged agreement, the plaintiffs must pay 1st defendants' costs. The two sets of costs, viz., the costs of the reference and seven-eighths costs of hearing of 1st defendants' exceptions which have been ordered to be paid to the plaintiffs will be set-off against the three-fourths costs of the hearing of the plaintiffs' exceptions and the costs of the hearing of exceptions 10 and 11 and the issue as to agreement which have been ordered to be paid by the plaintiffs to 1st defendants.

I will now deal with the costs of defendants 2, 3 and 4. I have already held that they are entitled to the general costs of the action. With regard to their costs of the hearing of the issue before Rangnekar, J., which have been reserved, it was pointed out to the Court that they took no part at the hearing and did not support the plaintiffs in their contention that it was 1st defendants and not Brijlal Ramjidas who were the partners in the suit partnership. At the same time plaintiffs' counsel has not been able to show that defendants 2, 3 and 4 took up an obstructive attitude towards the plaintiffs or helped 1st defendants. The issue was between the firm of Chimanram Motilal on the one hand and 1st defendant firm on the other, and defendants 2, 3 and 4 as partners of Motilal Chimanram were entitled to appear at the hearing on that issue. It does not matter if they did not take an active part at the hearing. I order that their costs of the issue which were reserved by Rangnekar, J., should also come out of the general assets of the suit partnership. Defendants 2, 3 and 4 were parties to the order of reference and were, therefore, entitled to appear before the Commissioner. I have already stated that almost the entire time of the Commissioner was taken up with the question of the payment of Rs. 50,000, and on that question defendants 2, 3 and 4 supported 1st defendants both before the Commissioner and also on the hearing of the exceptions before me. I order that defendants 2, 3 and 4 should only get their general costs of the reference; they must bear the rest of their costs of the hearing before the Commissioner themselves and also the costs of the hearing of the exceptions in Court. Exception 17 must be dismissed; I make no order as to the costs of that exception. The costs of all the parties of this hearing on costs and for further directions will come out of the general assets of the suit partnership to be mentioned again for further directions on the Report.

March, 26.—On the figures being mentioned to the Court and a typed copy showing the calculations handed in, there will be a decree in favour of the firm of Messrs. Chimanram Motilal which consisted of the two plaintiffs and defendants 2, 3 and 4 for Rs. 98,976-1-6, to be recovered as follows : 1st defendants to pay to the firm of Messrs. Chimanram Motilal Rs. 75,750-13-6, interest to run thereon at six per cent per annum from this date till payment. The firm of Messrs. Chimanram Motilal are hereby authorised to recover Rs. 23,225-4-0, being the net sale proceeds of the securities in the hands of Messrs. Mulla & Mulla, solicitors, after deduction of their costs, and to appropriate the sum in part payment of the decretal amount of Rs. 98,976-1-6. 1st defendants to pay 3/8ths, plaintiffs to pay 25/64ths and defendants 2, 3 and 4 to pay 15/64ths of such costs of the suit and of the reference as were ordered to be paid out of the partnership assets on 11th March 1936, including the costs of to-day's appearance and hearing, and also the costs, in the same proportions, of the reference to the arbitration of Mr. V. F. Taraporewala, Bar-at-law, which proved abortive. Liberty to apply.

P.R./R.K. *Order accordingly.*

A. I. R. 1937 Bombay 96

BEAUMONT, C. J. AND WASSOODEW, J.

Emperor

v.

Khanmahomed Shermahomed—Accused.

Criminal Ref. No. 63 of 1936, Decided on 7th August 1936, made by District Magistrate, Bombay.

(a) Penal Code (1860), S. 304-A—Approximate and ultimate cause of death.

It is very dangerous to attempt to distinguish in cases falling under S. 304-A between the approximate and ultimate cause of death due to a rash and negligent act. [P 97 C 2]

(b) Criminal Trial—Sentence—Deterrent—Mere loss of human life due to negligent driving is no ground.

The mere fact that a human life is lost due to negligent driving of a motor car does not justify the Court in passing a deterrent sentence, if the loss of life could not have been reasonably anticipated by the accused. In considering the question of enhancement of sentence one has to consider whether the rash and negligent act of the accused shows callousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused : *A I R 1937 Bom 80, Foll.* [P 98 C 1]

(c) Penal Code (1860), S. 304-A — Motor accident — Negligent driving — Court not bound to pass savage sentences.

It is no part of the duty of the Courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence. Moreover, one has to remember that driving motor cars has become an essential part of human activities and it is impossible to avoid a certain number of accidents. [P 98 C 1]

B. G. Rao — for the Crown.

P. B. Gajendragadkar and *V. M. Kuralkar* — for Accused.

Beaumont, C. J.—This is a reference by the District Magistrate, Bombay Suburban District, inviting us to enhance the sentence passed upon the accused, who is convicted under S. 304-A, I. P. C. The accused was sentenced to a fine of Rs. 150, in default three months' rigorous imprisonment.

The facts are that the accused was driving a motor lorry on 22nd October 1935, along the Ghodbunder Road from Andheri to Malad. At the same time, a private motor car was coming from Malad towards Andheri on the proper side of the road. There was a bullock cart going in the same direction as the accused's lorry, and with a view to passing the bullock cart the accused swerved on to the right-hand side of the road. His own case is, that owing to another lorry in front of him, which had just passed the bullock cart, he was not able to see whether the road was clear, and he did not see the approaching car. If he was not able to see that the road was clear, he had, of course, no right to go over to the right-hand side of the road in order to pass the bullock cart. He should have waited behind the bullock cart until he could see that the road was clear. The evidence rather suggests that as a matter of fact he could see the private car approaching, because the driver of that car says that he did see the accused's lorry quite plainly. If the accused could see the approaching car, presumably he committed an error of judgment in calculating the speed at which the car was approaching. He thought that he could get past the bullock cart before the other car got in his way, but in fact, he could not. At any rate, he found that he was in great danger of running into this private car, and in order to avoid crashing into the private car and probably killing the occupants, he swerved sharply to the right and went over some waste ground. In so doing, he hit the approaching car, and occasioned a certain amount of damage, but did not hurt the occupants ; and all would have been well with the accused but for the fact that he had in the back of the lorry a man who was sitting on a cask, and when the motor lorry went over this rough ground, it occasioned a bump, which threw the man sitting on the cask on to the road, and unfortunately he was killed.

Counsel for the accused has challenged his conviction, as he is entitled to do on a reference to enhance the sentence. But I think his conviction was justified. I think the accused was undoubtedly guilty of a rash and negligent act in going over to the right-hand side of the road, either without seeing that the road was clear or when he had not got time to get back to the proper side of the road before the private car, which was approaching, got into his way. No doubt the ultimate cause of the death of this unfortunate man who fell out of the motor lorry was occasioned by the rash and negligent act of the accused ; and I think it would be very dangerous to attempt to distinguish in cases under S. 304-A between the approximate and ultimate cause of death due to a rash and negligent act. There is no doubt that in the present case the accused was properly convicted, and the only question is whether the sentence passed on him should be enhanced. Now, assuming that the accused was wrong in going to the right-hand side of the road, in the first instance, there is, I think, no doubt that he took a very wise course in swerving on to the waste ground. He thereby avoided a very serious collision with the private car. If the man inside the motor lorry was sitting on a cask in such a position that a bump occasioned to the lorry would throw him on to the road, I think he was acting very foolishly. A motor lorry is always liable to go over a piece of bad road, particularly in this Presidency ; and anybody sitting inside a lorry should take care that he is sufficiently secured not to be thrown out merely by a bump. This may have been a bad bump, but I do not think that the accused could possibly have imagined that the man inside the lorry would not be able to hold on and prevent himself from falling out. The learned Magistrate takes the view that a deterrent sentence was called for on three grounds. He says, first of all, that a human life was lost. We held the other day that the mere fact that a human life is lost does not justify us in passing a deterrent sentence, if the lost life could not have been reasonably anticipated by the accused.[*] Then the learned Magistrate says that there was "extremely rash and callous conduct of the accused causing the accident without the least justification." If I took that view of the accused's conduct, I should certainly be in favour of enhancing the sentence. I think that in all these cases one has to consider whether the rash and negligent act of the accused which has occasioned the death, shows callousness on his part as regards the risk to which he was exposing other persons. I think the severity of the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused. Here I do not think there was any callous conduct. As I said before, the accused committed an error of judgment, but, having done so, he did his best to avoid the consequences of his error. The learned Magistrate's third ground is that:

> Accidents of this nature are of frequent occurrence, and in the interest of administration of justice and protection and safety of human life, such offences require to be sternly dealt with.

I do not agree with that principle. One has to remember that driving motor cars has become an essential part of human activities, and it is impossible to avoid a certain number of accidents. In my view it is no part of the duty of Courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence. In my opinion, there is no reason why we should interfere with the discretion exercised by the learned City Magistrate in imposing merely a fine. We, therefore, make no order on the reference.

Wassoodew, J.—I agree.

B.D./R.K. *Order accordingly.*

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[*] *See* A I R 1937 Bom 80.

A. I. R. 1937 Bombay 98

BEAUMONT, C. J. AND RANGNEKAR, J.

In re *Mahadeo Krishna Rupji.*

O. C. J. Appeal No. 58 of 1936, Decided on 1st October 1936.

Letters Patent (Bom.), Cl. 17—Minor Hindu co-parcener — Appointment of guardian — High Court has power to appoint guardian of undivided share of joint family property of minor member of joint Hindu family apart from Guardians and Wards Act—Court has also power to sanction alienation by father if it is satisfied that transaction is for benefit of minor.

Under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of property of minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The Court has jurisdiction to sanction an alienation by the father or the manager of a joint Hindu family where the Court is satisfied that the transaction is for the benefit of the minors: *25 Bom 353*; *16 Bom 634*; *19 Bom 96*; *A I R 1923 Cal 409* and *A I R 1932 Cal 502*, *Rel. on*; *A I R 1932 Bom 537*, *Expl.* [P 99 C 1; P 100 C 1]

Jamshed Kanga—for Appellant.

Beaumont, C. J.—This is an appeal from an order made by B. J. Wadia, J., in Chambers, and it raises a question of some importance to owners of property residing in Bombay. The petitioner and his minor sons are members of a joint Hindu family, and the petitioner is the manager. According to the statements contained in the petition the petitioner has had to borrow on the security of the joint family property substantial sums of money, part of them being secured on existing mortgages and part of them being unsecured. What he now desires to do is to raise a sum of Rs. 40,000 for the purpose of paying off all the existing debts of the joint family, and he wants to secure that sum of Rs. 40,000 by a mortgage of joint family property. The proposed mortgagee is not willing to advance the money unless an order is made by this Court appointing the petitioner guardian of his minor sons and sanctioning the mortgage on behalf of the minor sons. The learned Judge, without going into the merits, refused to make the order on the authority of a decision of Kania, J., to which I will refer in a moment. In my opinion earlier decisions of this Court establish clearly that the Court has jurisdiction in a case of this sort to make the order asked for. That jurisdiction was established definitely by a decision of a Full Bench in 25 Bom 353[1] in which it was held that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The applicant in that case also sought sanction of the Court for a sale of the family property in which the minor was interested and that sanction was given. That decision confirmed a practice which had been adopted in previous cases: 16 Bom 634[2] and 19 Bom 96[3] and such practice has since been followed in this Court and by the Calcutta High Court in 50 Cal 141[4] and 59 Cal 570.[5]

However, in the year 1932, Kania, J. in 34 Bom L R 1156[6] stated his view that although the Court had jurisdiction in a case of this sort to make the order, the Court ought not to exercise that jurisdiction except in very special circumstances. The learned Judge pointed out correctly that the manager of a joint Hindu family has power to sell or mortgage for legal necessity or for the benefit of the estate, and that the burden is upon the purchaser or mortgagee to prove that the sale or mortgage fulfills those conditions, and the learned Judge took the view that the purchaser or mortgagee had no right to cast that obligation on to the Court. I do not find myself able to agree with that reasoning. The attitude of a purchaser or a mortgagee is that unless he can get a good title, he is not going to enter into a contract of purchase or mortgage. He does not seek to cast any burden upon the Court; he merely says that he is not going on with the transaction unless he gets a good title. Now it is very difficult in many cases for a purchaser or a mortgagee to satisfy himself as to the existence of legal necessity, or benefit of the estate. It is very difficult for him to check the truth of the story told to him which is alleged to give rise to such necessity or benefit, and not only has he to do that, but he has to preserve evidence which will be available when the transaction may be attacked in years to come by a minor son of the manager. Experience in appeals from the mofussil has satisfied me that this burden which is cast on purchasers and mortgagees is a very heavy and often an unreasonable one. A sale or mortgage is often impeached some twenty years after the date of the transaction, and it is set aside because the purchaser or mortgagee, or those claiming through him, cannot at that distance of time, when material witnesses are no longer available, discharge the burden of satisfying the Court of the existence of legal necessity or benefit to the estate. I am not at all surprised, therefore, that legal practitioners in Bombay decline to advise their clients to enter into a transaction with the manager of a joint Hindu family unless they get an order of the Court, binding minor members, and it seems to me that as the Court has jurisdiction to make an order sanctioning the transaction, it ought in a proper case to do so. Whether a similar power ought not to be vested in mofussil Courts is a matter which might well engage the attention of the legislature. The petition in this case suggests that the money can be obtained on mortgage on much better terms if an order of the Court is obtained, than would be the case if an order is not obtained. Therefore the making of the order may well be for the benefit of the minors, and if the requisite facts are proved, in my opinion the Judge should not hesitate to make the order. But undoubtedly a Judge has to exercise great care in seeing that the case is a proper one. As Kania, J. points out, the evidence of the manager himself is generally interested, and it may not always be easy to check; but if the Court is not satisfied that the transaction is really for the benefit of the minor, it ought to refuse its assent.

In the present case the learned Judge has not gone into the merits, and therefore I think the case will have to go back to him, and I will only observe that I do not think that the evidence as it stands is sufficient to justify the Court in making an order. It can undoubtedly be corroborated by evidence from the persons to whom money is said to have been paid by the manager, and by further inquiry into one item of Rs. 3,100, which seems to be

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1. *In re* Munilal Hurgovan, (1901) 25 Bom 353 =3 Bom L R 411 FB).
2. Jairam Luxmon, (1892) 16 Bom 634.
3. *Re* Jagannath Ramji, (1895) 19 Bom 96.
4. *In re* Hari Narain Das, A I R 1923 Cal 409 =74 I C 244=50 Cal 141.
5. *In re* Bijaykumar Singh Buder, A I R 1932 Cal 502 =138 I C 739 =59 Cal 570.
6. *In re* Dattatraya Govind, A I R 1932 Bom 537=56 Bom 519=34 Bom L R 1156.

a liability incurred by the manager in not paying over a legacy. I only make those observations in order not to mislead the learned Judge of the Court below into thinking that we are satisfied on the evidence as it stands. On the general question, however, I am quite satisfied that this is a type of case in which the learned Judge ought to make an order if he is satisfied that the evidence shows that the mortgage will be one for the benefit of the minor. The case will therefore be referred back to be disposed of on the merits. Costs of the appeal will be costs in the petition.

Rangnekar, J.—This is an appeal in a petition presented by a Hindu father for being appointed a guardian of the undivided share of his two minor sons in a joint family, and for obtaining the sanction of the Court to the proposed mortgage of a joint family property in which he as well as the sons are equally interested. The matter came before the learned Chamber Judge, who, without going into the merits, and relying on the decision of Kania, J. in 34 Bom L R 1156[6] refused to entertain the application. The question is of some importance, and the question is, whether this Court has, apart from the provisions of the Guardians and Wards Act, inherent jurisdiction to appoint a guardian in the case of members of a joint family consisting of a father and his minor sons possessed of joint family property, and to sanction a transaction by way of sale or mortgage of the joint family property in a proper case. It is well established that under the Guardians and Wards Act a guardian cannot be appointed of the undivided interest of a minor in coparcenary property. Long before 1900 the practice in this Court was to entertain such applications, and it was recognised that this Court, which has inherited the jurisdiction of the Supreme Court, was not limited in such cases by the provisions of the Guardians and Wards Act, and had inherent jurisdiction to appoint guardians in such cases, and to sanction a transaction either by way of mortgage or sale in the case of joint family properties, where minors were concerned, if the transaction was for the benefit of the minors. Some doubt was felt in 1900 as regards the correctness of this practice. The matter then was referred to a Full Bench in 25 Bom 353[1] and the decision of the Full Bench was that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property, and the Court has jurisdiction to sanction an alienation by the father or the manager of a joint family where the Court was satisfied that the transaction was for the benefit of the minor. Since that decision the practice on the Original Side has uniformly been to recognise the jurisdiction of the Court in these matters, and in proper cases to make such orders. I myself remember, ever since I have been in this Court, such orders being made without any objection being raised to the jurisdiction of the Court. In 1932, however, Kania, J. seemed to cast some doubt upon the correctness of this practice in 34 Bom L R 1156[6] and I am told, since then the practice has been to refuse to accept petitions praying for the appointment of the father or a manager as a guardian of his minor son's interest in joint family property, and to decline to sanction such transactions without considering the merits of the case. When I was Chamber Judge this decision was mentioned, and in one or two cases which first came before me I felt some doubt about the correctness of the observations of my brother Kania. The question, therefore, is whether this new practice is justified. Apart from anything else, I think we are bound by the decision in 25 Bom 353[1] and I see no objection to our following the rule established by that decision. Not only, as I said, that the rule laid down in that case was followed by this Court until Kania, J.'s decision, but it has been also followed in Calcutta, and latterly in the Allahabad High Court. I need not refer to the cases which were cited before us by Sir Jamshedji Kanga on behalf of the appellant.

I have now carefully considered Kania, J.'s decision and I do not find anything in it contrary to the rule established in 25 Bom 353.[1] The learned Judge concedes that the Court has inherent jurisdiction to appoint a Hindu father, or a manager of a joint family, guardian of the undivided interest of the minor coparceners in the joint property. He then lays down that "the Court should not be ordinarily called upon to make such an order on the mere ex parte statements of an interested party." As I understand the judgment, all that the learned Judge says is that such orders should not be made in every case. I agree. But if the judgment means that the Court should not and cannot entertain such application, then, I am not, with respect, prepared to accept the decision. It is true that in one place the learned Judge has observed that it will be wrong to entertain applications of this nature for two reasons, the first being that according to the decision of the Privy Council in the well known case in 6 M I A 393[7] it is the duty of a purchaser or mortgagee or any one who wants to deal with joint family property to see that a legal necessity exists, and that moneys are required for a legal necessity or for the benefit of the estate. That, undoubtedly is correct, and many transactions take place which are not challenged, where the burden, which is placed upon a purchaser or mortgagee in such cases, is completely discharged without the parties coming to Court.

The second reason—and that seems to be his principal reason—is that a purchaser has no right to impose upon the Court the burden of satisfying itself that the transaction is one which is warranted by Hindu law. But I am unable to see on what principle a Hindu father, or the manager of a joint Hindu family, should be deprived of the right to come to Court and ask the Court to adjudicate upon the merits of the application on the ground that the transaction is for the benefit of his minor sons or minor members of the family, and that if the transaction was not sanctioned the other party to the transaction refuses to complete. With great respect to the learned Judge, I think it is wrong to say that the purchaser is casting any burden on the Court. The purchaser is not a party to such applications at least ordinarily, and it is a matter of perfect indifference to him whether the transaction is sanctioned or not. He is entitled to say that unless the vendor or mortgagor obtains an order sanctioning the transaction he would not complete, and that is all. Then assuming that it is a burden on the Court, I do not see why the Court should fight shy of discharging or bearing that burden. There are many burdens imposed on the Court, and one more, I do not think, would affect the position. Experience, on the other hand, shows clearly that such a practice is a wholesome practice. It is quite true that a purchaser is able to look after himself about the necessities of the transaction at the time the transaction takes place. But what would happen say after 20 years after the transaction? Is it to be expected that he or his successors would all the time carry evidence with them so as to discharge the burden when the question arose after the lapse of a considerable interval? There are many cases which come before us, which satisfy us as to the necessity of having a rule to this effect not only in this Court, but even in the mofussil. For the moment I am not concerned with the mofussil, but if I have jurisdiction in this Court, I see no reason or principle why I should decline it. I agree, therefore, that the learned Judge should not have rejected the application on the ground that he had no jurisdiction to entertain it. The matter must be referred back to him to be disposed of on the merits, as proposed in the judgment just delivered.

K.B./A.L. *Case referred back.*

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[7] Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).

A. I. R. 1937 Bombay 101

RANGNEKAR, J.

Gurunath Khandappagouda Patil—Appellant.

v.

Venkatesh Lingo Patil and *others*—Respondents.

First Appeal No. 70 of 1934, Decided on 5th August 1936, against decision of First Class Sub-Judge, Dharwar, in Special Misc. No. 44 of 1933.

Civil P. C. (1908), S. 144—Scope—Decree with costs by trial Court against *A*, *B* and *C*—Decree for costs executed against *A*—Appeal by *B* and *C* only—Decree reversed—*A* is entitled to restitution though not party to appeal.

The principle underlying S. 144 is to give to litigants the fullest benefit of a final decree in a litigation and restore to a party on the final determination of his rights what, if any, has in the meanwhile been lost to him or taken away from him by his opponent on the strength of a decree or order which has been subsequently varied or reversed by the superior Court. Before restitution can be made under this section, however, the following conditions must be satisfied: (1) that the applicant must be a party to the litigation which has terminated according to law. (2) That he has either lost something or been deprived of something by reason of the decree or order which has been subsequently varied or reversed. (3) That on the final pronouncement of his rights he is entitled to the benefit of restitution. The section does not in terms say that the applicant for restitution must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it state that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be of such a nature that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. The only question is whether the applicant was a party to the litigation in the first instance, and, if so, whether the final decision can be said to be in his favour as accepting his contentions made in the suit and declaring his rights. [P 102 C 2; P 103 C 1]

A decree with costs was made against *A*, *B* and *C* in the trial Court. The decree for costs was executed against *A*. On appeal by *B* and *C* to which *A* was not party the decree was reversed. *A* applied for restitution :

Held: that *A* was entitled to restitution though he was not party to the appeal as the appeal in effect and substance was in his favour : *12 C W N 642*, *Rel. on*; *17 Mad 82* and *25 Mad 426*, *Disting.* [P 103 C 2]

R. A. Jahagirdar—for Appellant.

G. R. Madbhavi—for Respondents 2 and 4.

Judgment. — This appeal is an offshoot of the well-known Privy Council decision in 60 I A 25,[1] and the short point which arises in this appeal is, whether under the circumstances of the case the respondent is, under S. 144, Civil P. C., entitled to a refund of certain costs which he had paid to the appellant under the decree made by the trial Court. The facts are not in dispute. The appellant brought a suit in the Dharwar Court against five persons, of whom the respondent was defendant 3. The suit was for a declaration that the adoption of defendant 2 who was the son of defendant 3, by defendant 1 was illegal and invalid, and for an injunction restraining the defendants from obstructing him in the enjoyment of the property in dispute. The trial Court made a decree in favour of the appellant with costs against all the defendants. After this decision, the appellant executed the decree for costs against defendant 3 and recovered a sum of Rs. 846-13-6 on 31st July 1936, from him. Defendants 1 and 2 appealed to the High Court. To that appeal the respondent was not a party. The High Court dismissed the appeal. Defendants 1 and 2 then preferred an appeal to their Lordships of the Privy Council, who set aside the decree made by this Court as well as the trial Court and dismissed the appellant's suit with costs throughout. The actual decree made by their Lordships is in these terms :

> The Lords of the Committee in obedience to His Late Majesty's said Order in Council have taken the appeal and humble petition into consideration and having heard counsel on behalf of the parties on both sides their Lordships do this day agree humbly to report to Your Majesty as their opinion that this appeal ought to be allowed, the decree of the High Court of Judicature at Bombay dated 28th February 1928 and the decree of the Court of the First Class Subordinate Judge of Dharwar dated 8th April 1925 be set aside and the suit dismissed with costs in both Courts. And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the respondent to the appellants their costs of this appeal incurred in the said High Court and the sum of £470-7-10 for their costs thereof incurred in England.

After the decision of the Privy Council, defendant 3 applied under S. 144, Civil P. C., for an order that the appellant should refund the costs which he had recovered from him with interest. The learned First Class Subordinate Judge, who heard the application, granted it and it is from that order that the present appeal is made. It was argued on behalf of the appellant that as defendant 3 was not a party to the appeal in the High Court, nor a party to the appeal before their Lordships of the Privy Council, he would not be entitled to any order of restitution under S. 144 of the Code. S. 144 is in these terms :

> (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal; (2) no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-s. (1).

In my opinion, the principle underlying this section is to give to litigants the fullest benefit of a final decree in a litigation and restore to a party on the final determination of his rights what, if any, has in the meanwhile been lost to him or taken away from him by his opponent on the strength of a decree or order which

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1. Bhimabai v. Gurunathgouda Khandappagouda, A I R 1933 P C 1=141 I C 9=60 I A 25 =57 Bom 157 (P C).

has been subsequently varied or reversed by the superior Court. Before restitution can be made under this section, however, the following conditions must be satisfied: (1) That the applicant must be a party to the litigation which has terminated according to law; (2) that he has either lost something or been deprived of something by reason of the decree or order which has been subsequently varied or reversed; (3) that on the final pronouncement of his rights, he is entitled to the benefit of restitution. The section, it should be noted, does not in terms say that the applicant for restitution must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it state that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be of such a nature that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. It is argued that even if the original decree is reversed in appeal, yet if the applicant for restitution was not a party to the appeal in which it was reversed, he cannot get the benefit of this section. In my opinion, there is no warrant upon the plain meaning of the section for accepting this construction. The only question is whether the applicant was a party to the litigation in the first instance, and, if so, whether the final decision can be said to be in his favour as accepting his contentions made in the suit and declaring his rights. I may in this connexion refer to the same principle laid down in O. 41, R. 4, Civil P. C., which, in my opinion, supports the view I am taking. O. 41, R. 4, provides that:

> Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

Therefore, if there is an appeal from a decree, even though that appeal is made by one party in which some other party equally interested is not joined, but if the appeal is on a ground common to both of them, then the reversal or the variation in the decree in favour of the appellant would operate for the benefit of the other party, and in that way, therefore, he would be entitled to contend that he was a party to the suit entitled to benefit by way of restitution. It is next argued that it must be shown that the applicant for restitution was entitled to a benefit by way of restitution. I have dealt with this contention, and I think all that it means is, that the final decree is in substance and effect in his favour, so that under it, it would be unjust to allow his opponent to retain any advantage which he had obtained by reason of the original decree. In this case, I think it is clear upon the facts that defendant 3 is entitled to a benefit by way of restitution. There cannot be the least doubt on the pleadings that the appeal by defendants 1 and 2 proceeded on a ground which was common to all the defendants, the common question being whether the adoption of defendant 2, who was the son of defendant 3, by defendant 1 was valid, and whether the defendants, including defendant 3, should not be restrained by any injunction from interfering with the enjoyment by the plaintiff of the property. The obstruction alleged to have been caused could only have been caused by defendant 3 in the right of the adoption of his son and for him, and upon the ground that the plaintiff was not entitled to the property. The question, therefore, must turn, and did turn, upon the validity of the adoption. I think, therefore, there is no substance in the contention. I am supported in the view I am taking by the decision in 12 C W N 642.[2] It was held in that case that the expression "any party" is not confined to parties to the appeal in which the decree has been reversed or modified:

> It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person.

Having regard to the Privy Council decision, it seems to me to be difficult to contend that the appeal in effect and substance was not in favour of defendant 3. Mr. Jahagirdar relies on two decisions of the Madras High Court The first is the case in 17 Mad 82.[3] It seems to me that the decision went upon the facts of the case, and it is difficult to hold on those facts that the appeal there proceeded on a ground which was common to both the defendants. The suit there was for rent, bought by a mortgagee against defendant 1 on the ground that he was his tenant, and against defendant 2 on the ground that he was setting up a title in himself adverse to the mortgagee. This suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint, and in execution, the principal amount of the rent, which had been paid into Court by defendant 1 with the request that it should be paid out to the person entitled to it, was paid over to the plaintiff. Defendant 1 preferred a second appeal against the decree so far as it awarded interest and costs. This second appeal was dismissed. Defendant 2 preferred, against the entire decree, a second appeal, which was successful, and the High Court dismissed the suit. Upon this, defendant 1 made an application under S. 583 of the old Civil P. C., which corresponds to the present S. 144, for refund of the money paid to the plaintiff. It was held that the applicant was not entitled to the refund claimed. The *ratio decidendi* there seems to be this, that the applicant was not entitled to restitution as there was no decree whatever in his favour. In other words the appeal had not been decided on any ground which was common to both the defendants ; and indeed on the facts of this case it could hardly be contended that the cause of action against both was one and the same. That against defendant 1 was that he was a tenant, and that against defendant 2 was that he was claiming to be the owner of the property in his own right. This, then, being the decision, on the facts of this case, I can hardly consider it to be an authority in favour of the appellant.

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[2] Gunga Prosad v. Brojo Nath Das, (1908) 12 C W N 642.

[3] Kasim Saib v. Luis, (1894) 17 Mad 82.

The second case is 25 Mad 426.[4] It clearly proceeds upon the final decree in the litigation. In that case a decree was obtained in a District Court against two defendants, by which they were ordered to deliver up certain property and to pay the costs of the suit. These costs were in fact paid by defendant 1. An appeal was preferred by both defendants jointly to the High Court, but defendant 1 died while it was pending. The legal representative of the deceased defendant was not brought on the record, and when the appeal came on for hearing, it was proceeded with by defendant 2 on his own behalf.

The result was the High Court reversed the decree of the District Court, but the High Court decree recited that the appeal had been prosecuted on behalf of the surviving defendant alone. The son and the legal representative of defendant 1 thereafter presented a petition in execution, under the old S. 583, claiming that the whole decree of the District Court had been reversed, and, therefore, he was entitled to restitution of the costs which had been realized by the plaintiff from his father. It was held that the application was incompetent. The judgment proceeds on the ground that it was expressly stated in the High Court decree that the appeal had been prosecuted on behalf of the surviving defendant alone, and, therefore, the decree must be construed as limited to his interests only. It is clear, therefore, that it was only on a construction of the High Court decree in the case that the Court came to the conclusion that the application for restitution was incompetent. Nor is it clear from the facts of the case reported that the decree there proceeded on a ground which was common to both the defendants. If these decisions lay down the proposition which the appellant contends for, then I have no hesitation in saying that I differ from them with all respect to the learned Judges who decided the cases. In my opinion, therefore, the view taken by the learned First Class Subordinate Judge is correct, and the appeal must be dismissed with costs.

P.R./D.S. *Appeal dismissed.*

A. I. R. 1937 Bombay 104

RANGNEKAR, AG. C. J. AND TYABJI, J.

Samalbhai Lallubhai Patel and *another*—Defendants—Appellants.

v.

Jesangbhai Ranchhoddas and *another*—Plaintiffs—Respondents.

Second Appeal No. 261 of 1936, Decided on 16th July 1936, against decision of Dist. Judge, Ahmedabad, in Appeal No. 36 of 1936.

Bombay Local Boards Act (6 of 1923), S. 35 (1) and (2) (k) — Regulations made by Taluka Board under S. 35 (1) — Regulation No. 35 making election of President and Vice-President, by voting by ballot—Regulation No. 35 is ultra vires of Act as it is inconsistent with S. 35 (2) (k) of the Act—Act makes no distinction between meeting for election of President and meeting for

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[4] Natesa Ayyar v. Annasami Ayyar, (1902) 25 Mad 426.

transacting any other business—Votes cannot be taken by ballot for election of President.

The Act makes no distinction between a meeting held by the Local Board for electing a President and a meeting held to transact any other business. The regulations framed by the Board do not also make such distinction. S. 35 of the Act applies to both. [P 107 C 1]

Section 35 (2) (k) of the Act clearly confers upon the member the right to have disclosed the names of the members voting for or against a resolution. The Board can make regulations "consistent with not only the Act and rules or order made by Government in this behalf" but also "subject to the provisions of the following subsections" of S. 35. Sub-cl. (k) is included in the sub-sections. Regulation 35 framed by the Local Board enacts for the election of the President or Vice-President, by means of ballot, which prevents the members voting for or against from being entered in the minute book as provided in S. 35 (2) (k), even if desired by a member. [P 106 C 2]

Regulation 35 being therefore inconsistent with S. 35 (2) (k) of the Act, is ultra vires of the Act. [P 106 C 2; P 107 C 1]

U. L. Shah—for Appellants.

G. N. Thakor and *P. A. Dhruva* — for Respondents 1 and 2.

Rangnekar, Ag. C. J. — This appeal raises a somewhat important question under the Bombay Local Boards Act (Bom. 6 of 1923). The question is whether a certain regulation made by the Taluka Local Board of North Daskroi is *ultra vires* the Act. First as to the facts: There was a meeting of the Local Board on 16th January 1935, for the purpose of electing a President of the Board. 20 members of the Board were present, and one Dwarkadas was appointed Chairman of the meeting. A resolution was moved and duly seconded by the plaintiffs to the effect that one Maneklal Manilal should be elected as the President. An amendment to the resolution was duly moved and seconded to the effect that defendant 1 should be elected as the President. Votes were taken by show of hands, and on a count the Chairman found that there were ten votes in favour of Maneklal and ten in favour of defendant 1. Thereupon, as the minutes of the meeting show, the Chairman gave his casting vote in favour of defendant 1. Upon that one Haribhai raised a protest that under Regulation 35 made by the board and sanctioned by the District Local Board, the votes ought to have been taken by ballot and not by a show of hands, and that the procedure followed was illegal. The Chairman overruled the objection. This suit is the result of the proceedings which thus took place at the meeting. It was brought by the respondents who are two members of the board against defendant 1, who, as I have stated, was elected President of the Board, and the Taluka Local Board, North Daskroi, defendant 2.

The trial Court accepted the plaintiffs' claim and declared that the election of defendant 1 was void and illegal and granted an injunction against defendant 1 restraining him from acting as President of the Board. There was an appeal to the District Judge of Ahmedabad, which was dismissed by the learned Judge, and it is from his judgment that this second appeal is made. The learned advocate on behalf of the appellant has raised four contentions; but in view of the conclusion to which we have come as regards one of them, it is not necessary to express any opinion on the remaining contentions. The most important contention raised by the learned advocate is that the Regulation on which the plaintiffs rely and upon the strength of which the plaintiffs succeeded in both the lower Courts is *ultra vires* the Act and therefore illegal and made without jurisdiction. It is necessary therefore to turn to the relevant provisions of the Act as also to some of the regulations made thereunder. S. 5 of the Act relates to the constitution of the board and it provides, omitting the unnecessary words: Every Taluka Local Board consists of (a) elective members, and (b) nominated members, that is members nominated by Government. The rest of the section is not material. It is clear that, having ragard to this section and the other provisions to which our attention has been drawn, the board comes into existence as soon as it has its members elected and members nominated, even though at the time the board may have no President. Then comes S. 22 which refers to the election of the President and it provides that: "every local board shall be presided over by a President, elected by the board from amongst its own members." S. 27 may be referred to as it has some bearing on the scheme of the Act relating to the question which we have to decide. It provides:

> On the expiry of the term of office of a local board the president and vice-president shall continue to carry out the current administrative duties of their offices until such time as a new president and vice-president shall have been elected and shall have taken over charge of their duties: Provided that in the case of the new board con-

stituted under this Act, a meeting for the election of a new president shall be called by the president of the retiring board.

Then it provides that :

> The president or vice-president of the retiring board and, in their absence, the chief officer, if any, shall preside at such meeting, and the new board shall then elect its own chairman for that meeting . . . The chairman so elected shall then preside at such meeting, and the meeting shall then proceed to elect the new president.

The meeting in question was held in accordance with the provisions of this section. The next section which is relevant is S. 35, sub-s. (1), which is in these terms :

> A local board shall meet together not less than once in every three months and shall from time to time make regulations, consistent with this Act and with any rules or orders made by the Government in this behalf under Cl. (c), S. 133 with respect to the place, day, hour, notice, management, and adjournment of such meetings, and generally with respect to the transaction of business, as it thinks fit, subject to the provisions of the following sub-sections.

These last words seem to me to be important and it is clear from the judgment under appeal that the learned Judge has omitted to notice them. Then sub-cl. (k) of S. 35 (2) is in these terms :

> Minutes shall be kept of the names of the members and of the Government officers, if any, present under the provisions of S. 40 and of the proceedings at each meeting of the board, and if any member present at the meeting so desire, of the names of the members voting, respectively for or against any resolution, in a book to be provided for this purpose, which shall be signed, as soon as practicable, by the president, vice-president or chairman of such meeting and shall at all reasonable times be open to inspection by any member of the Board or by any inhabitant of the district.

Sub-cl. (l) provides :

> Every regulation made under this section by a Taluka Local Board shall be subject to the approval of the District Local Board to which such Taluka Local Board is subordinate.

It was one of the contentions of defendant 1 that this particular regulation which was made under sub-s. (1), S. 35 was not approved by the District Local Board, but this contention was negatived by both Courts and has not been pressed before us. These then are the material sections of the Act. I now turn to the regulations which it is clear have been made under S. 35 (1). Regulation 1 says that a "Motion" includes a proposal and an amendment. Then Regn. 10 provides : "Every proposal and amendment except a formal motion such as a motion for adjournment shall be put in writing." Then Regn. 13 and the following regulations lay down the procedure for moving and seconding a motion or resolution and amendments thereto. Then Regn. 34 relates to the procedure for taking votes on proposals and amendments at the conclusion of the debate. Then comes the regulation which has been the subject of dispute between the parties. It is in these terms :

> 35. Votes shall ordinarily be taken by a counting of hands, but may if the presiding authority with the sense of the meeting so decide be taken by ballot. In the case of election of President and Vice-President they shall be taken by ballot.

The rest of the regulation is not material. Regulation 36 empowers a member to demand a poll. Regulation 37 explains what is meant by voting by ballot. It is as follows :

> When votes are taken by ballot, the members shall record their votes in writing in such manner as the presiding authority may prescribe. Such writing shall not be signed and shall not be seen by any person except the presiding authority and two scrutinisers to be appointed by him. Such papers shall be destroyed immediately after the result of the voting is declared.

The appellant, therefore, argues that Regn. 35 is *ultra vires* the Act, as the Act in sub-cl. (k), S. 35 (2) gives a right to any member to have the names of the members present voting for or against any resolution in any meeting recorded in a special book which then has to be signed by the presiding authority. The learned District Judge felt the force of this contention; but he thought that the section did not confer upon a member a right to have the names of members voting for or against a resolution recorded. The learned Judge further observed that "where voting is by ballot, the manner of voting is concealed and no member can demand its disclosure." This, in my opinion, is really begging the question. It is impossible in our opinion to accept this reasoning having regard to the explicit language of sub-cl. (k), S. 35 (2) Sub-cl. (k) of S. 35 (2) clearly confers upon the member the right to have the names of persons who voted for or against a resolution disclosed. The Board can make regulations "consistent with not only the Act and rules or orders made by Government in this behalf" as the Judge points out, but also "subject to the provisions of the following sub-sections," which would include sub-cl. (k). Regn. 35 therefore is clearly inconsistent with sub-cl. (k), and it is difficult to see how under the Act framed in this manner there could be any voting by ballot. As the learned Judge himself points out it is significant to notice that in an analogous

Statute, namely the Municipal Boroughs Act, the corresponding S. 35 (9) does not contain a similar provision; nor does the other Act referred to by the Judge, namely the Bombay District Municipal Act.

The learned Judge then refers to a book called the Bombay Local Boards Manual written by Mr. Cumming, and accepted the construction put upon the regulation and its validity by that gentleman. In our opinion it was irregular on the part of the learned Judge to refer to the Manual at all. The question of construction is one which is entirely for the Court, and can only be decided upon the language of the Act and sometimes, if necessary, by reference to analogous statutes. It is argued, as it was in the Court below, that S. 35, (2) (k) refers only to the manner in which the minutes of a meeting are to be kept. That no doubt is true, but it also provides for the right of a member to have the names of persons who voted for or against a resolution recorded. It is argued that a meeting for electing a President is a special meeting and differs from other meetings held for transacting business. As far as I can see, the Act makes no distinction between a meeting held by the Board for electing a President or any other meeting held to transact any other business. S. 35 would equally apply to both. Nor do the regulations make any such distinction. I think, therefore, we must allow the appeal, reverse the decree of the lower appellate Court and dismiss the suit with costs throughout.

Tyabji, J.—I agree that the appeal must be allowed. The suit is for a declaration that the election of defendant 1 as President of the Taluka Local Board of North Daskroi, at a meeting held on 16th January 1935, is void and illegal; and for an injunction restraining defendant 1 from working as President, and defendant 2, the Taluka Local Board, from accepting him as President. The validity of defendant 1's election as President depends upon the validity of Regn. 35 for the transaction of business, purporting to be framed by the Local Board under the powers conferred by S. 35 (1), Bombay Local Boards Act (Bombay Act 6 of 1923). The plaintiffs' case was that the disputed election was void as it had taken place at a meeting where "the votes were taken by a counting of hands," whereas Regn. 35 provides among other things that in the case of the election of the President "votes shall be taken by ballot." Defendant 1 does not deny that Regn. 35 was not given effect to at the meeting: but contends that Regn. 35, in so far as it provides for the election of the President by ballot, (understanding that expression as it is explained in Regn. 37), is itself invalid: it being *ultra vires* of the Local Board to frame such a regulation inasmuch as the power conferred upon the Local Board under S. 35, sub-s. (1), Bombay Local Boards Act, to make regulations for the transaction of business, is subject to the restrictions that the regulations shall be (1) consistent with the said Act, and (2) subject to the provisions of the sub-sections of S. 35; and it is contended that Regn. 35, so explained, is inconsistent with S. 35, sub-s. (2), Cl. (k), of the Act. It is provided by Cl. (k), with which, as I have stated, Regn. 35 is alleged to conflict, that if any member present at any meeting so desires, minutes shall be kept of the names of the members voting, respectively for or against any resolution, in a book to be provided for the purpose, which shall be signed, as soon as practicable, by the President, Vice-President, or Chairman of such meeting, and shall at all reasonable times be open to inspection by any member of the Board or by any inhabitant of the district. No regulation, it is argued, can therefore be valid which has the effect of taking away the right of any member present at any meeting of the Board to require that the names of the members voting respectively for or against any resolution be entered in the minutes of the proceedings of the Board: and Regulation 35 is said to be obnoxious in this respect to the provisions of Cl. (k).

The acceptance or rejection of this argument depends upon whether the election of the President must take place by members voting for or against any resolution, and upon the manner in which the regulations require the minutes to be kept of the proceedings for the election of the President. Dealing first with the form that the proceedings for the election of the President must take, the Regulations provide generally for the transaction of business and the conduct of proceedings at the meetings of the Board. The business to the transaction of which the Regulations refer fall in the main under three heads: minutes are required to be confirmed and signed (Regulations 6-7), questions put to the President must be dealt with by the presiding authority (Regulation 9) and proposals or motions and amendments thereto may be made, seconded and discussed (Regulations 10-38). I believe that the only other classes of business that are mentioned are : motions for adjournment (Regulation 39) points of order (Regulations 40-44) and the discussion of budget estimates or appropriation of funds, and rules or bye-laws. The election of the President must form part of the business to be transacted by the Board. It is enacted by S. 22, Local Boards Act, that every Local Board shall be presided over by a President elected by the Board from amongst its own members ; and S. 27 provides for a meeting for the election of a new President being called. Putting aside the business of confirming and signing of the minutes and dealing with questions, there is no provision in the Act or the regulations for any business being transacted except by way of a motion or proposal. Regulations 45 and 47 are hardly exceptions in this respect. They contain specific provisions applicable to particular forms of proposals.

But neither these Regulations nor any other to which our attention was drawn has any bearing on the election of the President. The election, which is the subject of the present controversy, was itself held through the medium of a proposal and an amendment thereto ; and yet no exception has been taken to the adoption of this course, nor is any alternative suggested. All that is objected to is that the votes for and against the proposal and amendment were taken by show of hands and not by ballot. It may be taken therefore that proceedings for the election of the President must conform with the usual method for the transaction of business, viz. through a proposal made in writing, with, if desired, amendments to the proposal. The provisions in S. 35, sub-s. (2), Cl. (k), must apply to resolutions for the election of the President as much as to any other resolutions. If therefore any member present at the meeting at which the election of the President takes place so desires, the names of the members voting respectively for or against the resolution by which the election of the President takes place must be entered in the minutes. Regulation 36 is directly concerned with the form of the minutes. It must however be considered with the connected Regulations 35 and 37. Regulation 35 provides that "votes shall ordinarily be taken by a counting of hands," but to this general rule two exceptions are introduced : (1) if the presiding authority with the sense of the meeting so decide, "votes may be taken by ballot." (2) Excep. 2 is that :

> In the case of the election of the President and the Vice-President they (the votes) shall be taken by ballot.

The next two Regulations show what, so far as the minutes are concerned, is implied respectively in votes being taken by a counting of hands and by ballot:

> When votes have been taken by a counting of hands, the presiding authority shall on the demand of any member, cause to be recorded in the minute book the names of the members voting for or against the motion and of those who have declined to vote (Regulation 36).

This gives effect to Cl. (k) of sub-s. (2), S. 35. Next, Regulation 37 deals with the other form of voting, and it is provided that :

> When votes are taken by ballot, the members shall record their votes in writing in such manner as the presiding authority may prescribe. Such writing shall not be signed and shall not be seen by any person except the presiding authority and two scrutinisers to be appointed by him. Such papers shall be destroyed immediately after the result of the voting is declared.

It is clear therefore that on the votes being so taken by ballot, the names of the members voting respectively for or against the resolution cannot, even if a member so desires, be entered in the minute book as provided by Cl. (k) of sub-s. (2), S. 35. Only one argument seemed to me to throw any doubt on the question, the argument that the election of the President was the transaction of a business of so peculiar a nature that proceedings relating to it must stand on a special footing ; and consequently that the minutes recording such proceedings may reasonably be in a different form from the minutes relating to the ordinary business transacted by the Local Board ; and that it is the ordinary business with which Cl. (k) of sub-s. (2), S. 35 deals. There is no justification however for holding that any such cleavage in the two classes of business is to be found in the regulations or the Act, or that the election of the President is put in a class apart from the transaction of the ordinary business. Nor do Regulations 35-37 restrict the taking of votes by ballot to the election of the President.

In my opinion the provision contained in Regulation 35 to the effect that on a motion or amendment having reference to the election of the President, votes shall be taken by ballot, understanding that expression as it is explained in Regulation 37, is inconsistent with the provisions of Cl. (k) of sub-s. (2), S. 35, Local Boards Act; and consequently making a regulation with such a provision was beyond the powers conferred upon the Local Board under S. 35, sub-s. (1) of the Act. For these reasons I agree that the appeal must be allowed and the suit dismissed with costs throughout.

K.B./A.L. *Appeal allowed.*

A. I. R. 1937 Bombay 109

BROOMFIELD AND TYABJI, JJ.

Secretary of State—Appellant.

v.

Narayanrao Ganpatrao Vinchurkar—Respondent.

First Appeal No. 146 of 1931, Decided on 19th August 1936, against decision of First Class Sub-Judge, Nasik, in R. C. Suit No. 487 of 1926.

Bombay Revenue Jurisdiction Act (10 of 1876), Ss. 4 (f), 5 (a)—Jurisdiction of Civil Court—Saranjamdar bringing suit against Government to recover ain chillar wrongly credited by Government—Suit is not barred under S. 4 (f) or S. 5 (a) of the Act.

Where a Saranjamdar brings a suit in civil Court against Government for recovery of ain chillar wrongly credited by Government, the suit is not one claiming to hold land. The Saranjamdar is grantee of revenue and not of the land and suit has nothing to do with the land revenue claimed from or by the Saranjamdar and the suit is therefore not barred under S. 4 (f) or S. 5 (a) of the Act. The chillar fund may no doubt be said to be payable out of the land revenue, but when Cl. (f) refers to claims against Government to receive payment payable out of the land revenue, it must mean payable out of the land revenue which is itself payable to Government. The clause cannot have been intended to bar a suit by an alienee of the land revenue to recover sums wrongly deducted from the land revenue payable to him. [P 111 C 1]

P. B. Shingne—for Appellant.

H. C. Coyajee and *D. G. Dalvi*—for Respondent.

Broomfield, J.—These are appeals by Government in two companion suits by the representatives of the two branches of the Vinchurkar family to recover certain sums which Government have deducted from the revenue of the plaintiffs' saranjam villages in the Nasik District for eleven years before the suits. The original grant to plaintiffs' ancestors was in 1763. But in 1892 Government resumed the saranjam and restored one-half of it only including the villages in suit to the plaintiffs. Both the original grant and the re-grant in 1892 were subject to the liability to pay certain allowances called kadim hakks and other village expenses. For the payment of these charges six per cent of the revenue of the villages, after deduction of remission if any, is set apart. This fund is called the chillar. If any balance remains after payment of the hakks and expenses it is called the ain chillar or net chillar. The sums which plaintiffs claim to recover in these suits amounting in the one case to Rs. 10,438 and in the other to Rs. 12,909 are in respect of items of ain chillar from 1916 to 1927.

The way in which these moneys came to be deducted by Government from the revenues of the plaintiffs' villages was this : Prior to 1897 Government appear to have taken the view that the holders of alienated villages, whether inamdars or saranjamdars, were entitled to receive the whole revenue collected by the village officers, to pay thereout the kadim allowances and other village expenses and to keep the balance if any of the fund earmarked for the purpose. But in 1897 there was a Government Resolution which directed that the practice should be changed and that the village officer should deduct the kadim allowances before paying the revenue to the inamdars or saranjamdars and remit the amount to the Government Treasury. It is by no means clear that this would in any way affect the item of ain chillar, which, as already stated, was the balance of the six per cent of the revenue after payment of the expenses. In any case the orders contained in the Government Resolution were not carried out, at any rate in the villages of this saranjam, and until the year 1916 the whole of the revenue continued to be paid to the saranjamdars who expended what was necessary for the kadim allowances and other village expenses, and presumably kept the balance, the ain chillar, for themselves. In 1916, however, the Collector issued orders to the village officers that the balance of the chillar fund remaining after payment of the kadim hakks was not to be paid to the jahagirdars but remitted to the Government Treasury. Several inamdars brought suits challenging this order and were successful, this Court holding in *Vasantrao Narayanrao* v. *Secy. of State*,[1] that the inamdars were entitled under their grants to administer the chillar fund. On the other hand a suit by a saranjamdar, that of Jalalpur in the Nasik District, was not successful. This Court held in *Shrimant Dhairyasheelrao Yeshwantrao Powar* v. *Collector of Nasik*,[2] that he had no rights over the chillar fund because the re-grant of the saranjam to him was silent on the point and because the practice of the saranjam, which in the absence of any other evidence was the best index to the meaning of the grant, had been inconsistent with his claim. In 1923 there was a new Government resolution ordering a return to the old practice in the case of inam villages. But the orders were not modified in the case of saranjam villages, and the amount of ain chillar was remitted to the Government Treasury and not paid to the saranjamdars. Plaintiffs failing to get redress from Government then brought these suits, one in 1926 and the other in 1928.

The plaintiffs claim to recover the sums which they allege have been wrongly credited to Government and also pray for an injunction against that recovery by Government of these sums in future. The basis of their claim is that they are saranjamdars, the grantees of the revenue of the villages. They do not allege any kadim hakk in respect of the chillar, nor need they do so. The ain chillar is not a specific grant like a kadim hakk. It is, as I have explained, merely the balance of the six per cent fund left after payment of hakks and expenses. How and when the practice of setting apart six per cent of the revenue for these purposes arose there is no evidence at all to show. But though it is clear that the saranjamdars were under a liability to pay the kadim hakks, and although they may also have been liable to incur expenditure on other village expenses, there is no evidence whatever to show that they were under any liability to set apart six per cent of the revenues of their villages for these purposes. The suits were defended by Government, firstly, on the ground that they are barred by Cl (f) of S. 4 Revenue Jurisdiction Act; secondly, on the ground that the chillar fund was excluded from the grant to the plaintiffs in 1892. It was also contended that in any event the plaintiffs cannot claim arrears of ain chillar for eleven years.

On the merits, according to the *ratio decidendi* in *Shrimant Dhairyasheelrao Yeshwantrao Powar* v. *Collector of Nasik*,[2] the plaintiffs' claim would seem to be clear enough. It is true that there is nothing in the grant of 1892 (Ex. 178) about the right to administer the chillar fund, but that silence under the circumstances is in the plaintiffs' favour. Government rely on the fact that the kadim inams were deducted from the gross revenue of the villages in calculating the value for division. That of course had to be done if an equal division of revenue was intended, as it manifestly was. The kadim inams were liabilities, not assets. It is contended that the figures of the average revenue of the various villages, given in the correspondence prefixed to the Government resolution, were arrived at after deduction of the whole chillar fund of six per cent and not only after deduction of the amounts of the kadim inams. I am not sure that the evidence is sufficient to make that clear, but even assuming that that was the case, it does not in my opinion make any difference; for what was granted to the plaintiffs was not the amount of revenue mentioned in the Commissioner's letter, but half the saranjam consisting of twenty-four villages. To suppose that Government intended to reserve to itself any portion of the revenue of those villages would be contrary to the whole tenor of the correspondence and of the Government resolution. Indeed no such idea can have been in the mind of Government at all at that time. It was not until 1897, five years after the grant of the saranjam, that orders were issued about crediting the amount of the kadim hakks in the Treasury, and it was not till 1916 that it occurred to the Collector to question the saranjamdars' right to the ain chillar. From 1763 to 1916 the saranjamdars administered the chillar fund, so that the practice of the saranjam, "the best index of the meaning of the grant," is entirely in plaintiffs' favour.

Section 4 (f), Revenue Jurisdiction Act, bars the jurisdiction of the civil Courts to entertain claims against Government to hold land wholly or partially free from payment of land revenue, or to receive payments charged on or payable out of the land revenue. The learned trial Judge was apparently of opinion that the case might come under this clause but that it was taken out of it by the proviso to S. 4 and also by S. 5, sub s. (a). In my opinion neither the provisos to S. 4 nor S. 5 (a) have any application to the present case. The plaintiffs are not claiming to hold land. They are grantees of the revenue, not of the land, and these suits have nothing to do with land revenue claimed from or paid by the plaintiffs. But the point is that S. 4 (f) itself cannot apply. The chillar fund may no doubt be said to be payable out of the land revenue, but when this clause refers to claims against Government to receive payments payable out of the land revenue, it must mean payable out of the land revenue which is itself payable to Government The clause cannot have been intended to bar a suit by an alienee of the land revenue to recover sums wrongly deducted from the land revenue payable to him. If so, Government might order the whole of the plaintiffs' revenue to be credited to Government and they would have no redress. As Mr Coyajee who appears for the respondents has pointed out, land revenue is defined for the purposes of the Act in S. 3 as meaning all sums and payments received or claimable by or on behalf of Government. There is, therefore, no ground for holding that these suits are barred by the Revenue Jurisdiction Act.

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[1] F A. No. 29 of 1921, decided by Macleod, C. J. and Coyajee, J., on 7th February 1922.

[2] F. A. No. 244 of 1921, decided by Macleod, C. J. and Crump J., on 6th April 1923.

That leaves only the question of the number of years for which the plaintiffs are entitled to claim arrears. The contention on behalf of Government is that they are entitled to arrears for three years only under Art. 62 or Art. 63, Lim. Act. It has not been necessary to go into this question because Mr. Coyajee on behalf of the plaintiffs has stated that he agrees to accept the contention of Government that arrears for three years only should be decreed. The result is that the decrees of the lower Court will be modified by reducing the amounts awarded to the arrears for three years before suit. The appellants must pay the plaintiffs their costs in both Courts in proportion to the amounts decreed. Cross-objections are dismissed with costs.

Tyabji, J.—I agree.

K.B./A.L. *Decrees modified.*

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* A. I. R. 1937 Bombay 111

RANGNEKAR, J.

Narayan Ramchandra Ambure — Appellant.

v.

Dhondiba Tukaram Gavali — Respondent.

Second Appeal No. 162 of 1934, Decided on 29th July 1936, from decision of Asst. Judge, Sholapur, in Appeal No. 179 of 1933.

*** (a) Civil P. C. (1908), S. 141—Scope—Execution—Reference to arbitration—S. 141 does not apply to execution proceedings — Reference to arbitration and award made by arbitrators or by Court as umpire is illegal and without jurisdiction.**

Section 141 lays down that procedure applicable to suits under the Code is as far as possible to be followed in other original proceedings of the nature of suits such as proceedings in probate, guardianship, etc. The section does not apply to proceedings in execution of a decree which are proceedings in suit. The reference to arbitration therefore in execution proceedings at the instance of parties is without jurisdiction and the award of the arbitrators or of the Court as an umpire is illegal and without jurisdiction; *12 All 179 (P C), Rel. on.* [P 112 C 1, 2]

*** (b) Civil P.C. (1908), Sch. 2—Scope—Execution—Reference to arbitration—Sch. 2 does not apply to execution proceedings — Reference to arbitration and award made by arbitrators or by Court as umpire is illegal and without jurisdiction.**

Schedule 2 does not apply to execution proceedings. The reference therefore to arbitration in execution proceedings at the instance of parties is without jurisdiction and the award of arbitrators or of the Court is illegal and without jurisdiction: *A I R 1925 Cal 812, Rel. on.* [P 112 C 2]

M. R. Jayakar and *S. R. Parulekar*—for Appellant.

P. B. Gajendragadkar — for Respondent.

Facts.—The appellant Narayan brought a suit against Dhondiba, the respondent, for a declaration and injunction restraining him from damaging his wall which adjoined the house of Dhondiba. A consent decree was passed in the suit. Dhondiba however thereafter erected a privy in lime and stone, near the appellant's wall. On its completion, the appellant filed an application for execution asking that the respondent be ordered to remove it to some feet away from the wall, as he failed to comply with the provisions of the consent decree. Both parties agreed to refer the dispute to two arbitrators chosen by each and a decision arrived at by majority of them; if they disagree and there is no majority, by the decision of the Court. The arbitrators did not agree and the Court in the event decided that the respondent should remove the privy at his own cost, as the work was not done according to the decree. On appeal by Dhondiba the lower Court's order was set aside holding that the work was done in accordance with the consent decree. The plaintiff Narayan has come in second appeal.

Judgment.—(After setting out the facts his Lordship proceeded.) Two points are taken by the learned counsel on behalf of the appellant. The first is that there being a reference to arbitration by the parties and accepted by the Court, upon the terms of that reference, the Court was constituted as an umpire in the event of the arbitrators failing to agree. Therefore the decision of the learned Subordinate Judge of Sholapur was a decision of an umpire and no appeal from it was competent to the District Court. The second point is with regard to the merits of the case. Now it is clear from S. 89, Civil P. C., that save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2 to the Code. It is not argued that this reference is justified either by the Arbitration Act or by any other law, but it is contended that the reference though made in execution proceedings is governed by the provisions of Sch. 2 to the Code, which deals with arbitration in general in pending suits and references made outside Courts. The question then is whether the present reference to arbitration will come under Sch. 2. In support of his argument the learned counsel for the appellant relies on the provisions of S. 141, Civil P. C. That section provides:

> The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

In my opinion the meaning of the section upon its clear terms is that the procedure to be followed in regard to suits under the Code is as far as possible to be followed in other original proceedings of the nature of suits, such as proceedings in probate, guardianship, under the Trusts Act for the appointment of a trustee, Lunacy Act, etc. The section does not apply to proceedings in execution of a decree which are proceedings in the suit. S. 141 corresponds to the old S. 647 of the Code of 1882. There was a difference of opinion between the several High Courts in this country as to whether the old S. 647 applied to execution proceedings. It was held by the Allahabad and Bombay High Courts that the section applied to applications for execution. A contrary view was taken by the Calcutta High Court. Having regard to this conflict of opinions the legislature amended S. 647 in 1892 by adding an explanation which was in these terms:

> This section does not apply to applications for the execution of decrees which are proceedings in suits.

The result of this amendment was to supersede the view taken by this Court as regards the applicability of S. 141. Before the amendment however the same question arose before the Privy Council in 12 All 179,[1] and it was held by their Lordships of the Privy Council that S. 647 did not apply to applications for execution, but only to original matters in the nature of suits, such as proceedings in probate, guardianships and so forth. Apart from this, it seems to me that it is very difficult to hold that the provisions of Sch. 2 are applicable in applications for execution proceedings: for one thing it is impossible to apply some of the provisions in Sch. 2, particularly those which provide for the acceptance of the award where no objection could be taken to it, or if taken has been overruled, and for the Court being bound thereupon to pass an award decree which would be capable of execution. I need not dilate upon the point, because the view which I am inclined to take has been taken by the Calcutta High Court in 52 Cal 559.[2] It seems to me therefore that the Subordinate Judge had no jurisdiction to accept the reference to arbitration and to make an order on it, and that the award if any made either by the arbitrators or by him as an umpire is illegal and without jurisdiction. The decision of the Subordinate Judge would then come under S. 47, Civil P. C., and would be appealable in the ordinary way. The learned Assistant Judge in appeal therefore was right in overruling the contention made on behalf

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1. Fakirullah v. Thakur Prasad, (1890) 12 All 179=1890 A W N 53 (P C).
2. T. Wang v. Soan Wangdi, A I R 1925 Cal 812 =87 I C 633=52 Cal 559=42 C L J 26.

of the plaintiff though upon a different ground. (The judgment then dealt with the second point which referred to the facts of the case.) The appeal is dismissed with costs.

W.D./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 113

BROOMFIELD AND TYABJI, JJ.

Parshram Shivajiram — Plaintiff — Appellant.

v.

Gulabsing Fattesing — Defendant — Respondent.

First Appeal No. 278 of 1931, Decided on 30th July 1936, against decision of Dist. Judge, Dhulia, in C. S. No. 1 of 1931.

Bombay Court of Wards Act (1 of 1905), S. 31—Construction—Words'the property of any Government ward' refer to estate of which Court of Wards has assumed superintendence including part of estate which may be subject to pre-existing liabilities—Suit instituted without notice by promisee against Government ward as legal representative of deceased promisor—Suit without notice does not lie.

The words 'the property of any Government ward' in S. 31 of the Act are used in referring to the estate of which the Court of Wards has assumed superintendence including that part of the estate which may be subject to pre-existing liabilities, a part that may consequently never become the 'property of any Government ward' in its strict sense. Superintendence having been assumed, there is no warrant for introducing a distinction between the two parts of the estate. The assumption of the superintendence has a retrogressive effect inasmuch as the superintendence is not restricted to management after the date of its assumption, but the Court of Wards must deal with liabilities created prior to the date of assumption of superintendence. [P 114 C 2]

A suit brought without notice by a promisee against Government ward holding property of deceased promisor as his legal representative is therefore barred under S. 31 of the Act. [P 114 C 2]

K. H. Kelkar and *Y. V. Dixit*—for Appellant.

P. B. Shingne — for Respondent.

Broomfield, J.—This appeal arises out of a suit on a promissory note executed on 24th September 1927, by one Fattesing Gumansing, the Chieftain of Gangtha, who died in 1929. His estate passed to his son Gulabsing and was taken over by the Court of Wards under a notification of 30th January 1930. The suit was brought on 24th September 1930 and has been dismissed as barred by S. 31, Court of Wards Act (Bom. Act 1 of 1905). That section is as follows :

> No suit relating to the person or property of any Government ward shall be brought in any civil Court until the expiration of two months after notice in writing stating the name and place of abode of the intending plaintiff, the cause of action and the relief claimed, has been delivered to, or left at the office of, the Court of Wards ; and the plaint shall contain a statement that such notice has been so delivered or left.

There is a proviso which does not apply in the present case. It is admitted that the notice required by this section was not delivered. The learned District Judge who tried the case held, therefore, that the suit was barred and must be dismissed. In my opinion he was perfectly right. The argument which has been placed before us is that this is a suit to enforce a liability against the legal representative of a deceased promisor. A decree is sought against the estate of Fattesing Gumansing in the hands of the defendant, his son. That being so, it cannot be said to relate to the property of a Government ward within the meaning of S. 31. But, in my opinion, it does relate to the property of the ward. The words 'suit relating to the person or property' in S. 31 are very wide, and I should say intentionally so. There is no more reason why a notice should be required in the case of a liability incurred by the ward himself than in the case of a liability incurred by his ancestor or predecessor. It must be only in very rare cases that a Government ward can incur a liability himself, and, on the other hand, the reason that estates have to be taken under management most commonly is that they have become impoverished by the ward's ancestors or predecessors. I think the words of the section are wide enough to cover the case where the liability which is sought to be enforced against the property was incurred before the property was acquired by the defendant. In my view, therefore, the appeal must be dismissed with costs.

Tyabji, J.—The question turns upon the construction of S. 31. Court of Wards Act (Bombay Act 1 of 1905). We have to decide whether the suit relates to the property of any Government ward. The suit is based on a promissory note executed on 24th September 1927, by the father of the defendant. On 30th January 1930, after the death of the father, the Court of Wards assumed superintendence of the property of the defendant, who thus became a Government ward. I is argued for the plaintiff that this suit does not relate to the property of the defendant, but that it relates to a liability of his deceased father and that only that part (if any) of the property of the deceased which may be left after satisfying the liabilities of his deceased father can become the property of the defendant. Such an argument can of course only be taken when the property devolves upon an heir; which implies that the deceased's interest in the property was not joint nor liable to determine on his death and that there were no joint owners to take by survivorship the whole property in their own right. Speaking of an estate consisting of property that devolves by inheritance, it must, in my opinion, be conceded that the whole of such an estate of a deceased person does not necessarily become the property of the heir of the deceased. The estate of the deceased person is subject to certain liabilities which must be satisfied, before the heir can claim the residue as his own. The claims of the creditors of the deceased have priority over those of the heir. It is only after the claims of the creditors are satisfied that the property can become the property of the heir.

When the creditor of a deceased person sues for payment of a debt due by the deceased and a decree is obtained in the suit, what is liable in execution of the decree (which is based on a liability of the deceased) is the property of the deceased and not the property of the heirs of the deceased. But this is not what has to be determined in considering whether S. 31 is applicable. That section does not depend on whether the property liable in execution must be deemed to be the property of the deceased or whether it is that net part of the estate of the deceased which has devolved on the heirs. What S. 31 refers to are suits that relate to the property of the ward. I will assume that the property is inheritable and not to be taken by the survivor of two joint owners. The present suit is one that will have the effect of either materially reducing the net estate which will—after payment of the debts of the deceased—ultimately become the property of the ward, or it will have the effect of protecting the gross estate of the deceased from an unfounded claim, so as to leave a larger net estate to be taken by the ward. It cannot be denied that such a suit vitally relates to the net estate—to that residue which is the property of the ward. Moreover the Court of Wards is intended to protect estates taken under its superintendence. In view of this purpose of the Act, the words 'the property of any Government ward' are used in referring to the estate of which the Court of Wards has assumed superintendence including that part of the estate which may be subject to pre-existing liabilities, a part that may consequently never become the 'property of any Government ward' in its strict sense. Superintendence having been assumed, there is no warrant for introducing a distinction between the two parts of the estate. The assumption of the superintendence has a retrogressive effect inasmuch as the superintendence is not restricted to management after the date of its assumption, but the Court of Wards must deal with liabilities created prior to the date of assumption of superintendence. In my opinion notice was necessary before the suit could have been brought, and, therefore, the suit was rightly dismissed.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 114

BROOMFIELD AND TYABJI, JJ.

Trimbak Ravji Pradhan and *others* — Defendants—Appellants.

v.

Vishnu Waman Kanitkar and *others*—Plaintiffs—Respondents.

Appeal No. 39 of 1935, Decided on 28th August 1936, against decision of N. J. Wadia, J., in S. A. No. 640 of 1935.

Bombay District Municipal Act (3 of 1901, as amended by Act 26 of 1930) Ss. 23, sub-s. (7-A), 38—Newly elected Municipal Board —Election of new President—Presence of retiring President in chair is integral part of proceedings—Election of new President in absence of retiring President is invalid—S. 38 cannot be applied to such a case.

The retiring President is an integral part or his presence in the chair is an integral part of the machinery for the election of a Chairman at the meeting at which the new President has to be elected. It is not a mere matter of procedure which can be disregarded without affecting the validity of the proceedings. So if the new President is elected in the absence of the retiring President the election is invalid and S. 38 cannot be applied to such a case : *The King* v. *Gaborian*, *(1809) 11 East 77* ; *A I R 1926 Bom 576* and *A I R 1927 Bom 603, Disting.* ; *The King* v. *Buller*, *(1807) 8 East 389, Rel. on.*
[P 116 C 2; P 118 C 1]

M. A. Somji and *B. G. Modak* — for Appellants.

G. C. O'Gorman and *K. H. Kelkar* for *A. A. Adarkar* — for Respondents 1 to 5.

Broomfield, J. — We are concerned in this case with a dispute between members of the Municipal Board of Bhivandi-Nizampur in the Thana District, as to whether plaintiff 5, who was elected President of the Municipality at a meeting held on 6th November 1934, was or was not validly elected. This depends on the construction of S. 23, sub-s. (7-A), Bombay District Municipal Act 3 of 1901, as amended by Act 26 of 1930. This clause provides as follows :

> On the expiry of the term of office of a Municipality the President and Vice-President shall continue to carry on the current administrative duties of their offices until such time as a new President and Vice-President shall have been appointed or elected and shall have taken over charge of their duties. Provided that in the case of a new Municipality constituted under this Act, a meeting for the election of a new President shall be called by the President of the retiring Municipality. The President of the retiring Municipality shall preside at such meeting and the new Municipality shall then elect its own Chairman for that meeting. In case of an equality of votes the result of the election of the Chairman shall be decided by lot to be drawn in the presence of the President of the retiring Municipality in such manner as he may determine. The meeting shall then proceed to elect the new President.

The facts, so far as it is necessary to state them were as follows : There was a general election in 1934 and a new Municipal Board was elected. It then became necessary to elect a President in accordance with S. 23, sub-s. (7-A). Acting under it, the retiring President, who was defendant 1 in the suit, called a meeting of the newly constituted Board for the purpose of electing a new President. He issued a circular, announcing that the meeting would be held on 6th November 1934. The members assembled in the Municipal hall on that date, but the retiring President did not appear. He had sent a note to the Municipal Secretary, stating that he was ill and intimating that the meeting should be held on 13th November. However, the members assembled there, who formed a quorum, did not go away. They elected plaintiff 1 as Chairman of the meeting and then proceeded to elect plaintiff 5 as the new President. The retiring President did not recognize this election as it had taken place in his absence. He attempted to hold another meeting on 13th November 1934, but was restrained by an injunction obtained in a suit brought by plaintiff 5. That is not a suit with which we are concerned. As there was a deadlock, the Collector of Thana acting under sub-s. (10), S. 23 called a meeting of the Municipality on 25th January 1935, at which defendant 2 was elected President. The suit from which the present appeal arises had been instituted on 18th January 1935. The reliefs prayed for were that the proceedings and resolutions of the meeting of 6th November 1934, should be declared to be valid and binding on the defendants, and that the latter should be restrained by injunction from acting contrary to those proceedings and resolutions. The trial Judge decided the suit in favour of the plaintiffs and that decision was confirmed in appeal by the District Judge. After the decision of the District Judge, which was given on 10th September 1935, defendant 2, who had been elected President at the Collector's meeting and had been acting as such ever since, ceased to act, and plaintiff 5 took up office.

The case has been very elaborately argued both before the trial Judge and the District Judge. At the trial a number of points were taken which no longer concern us. The District Judge thought that the essential issue in the case might be narrowed down to this, viz., whether S. 23, sub-s. (7-A), confers a statutory right on the retiring President to preside at the first meeting of a new Board until such time as a new Chairman is elected, so that if he does not preside the election of a Chairman in his absence and consequent election of a President are illegal and null, or whether the clause in question merely lays down a rule of procedure for the guidance of the retiring President, breach of which does not invalidate the proceedings of the Board. These opposing views which have formed the basis of the arguments before us might also be put in this way : Is the presence of the retiring President in the Chair an essential part of the machinery for the election of a Chairman at the meeting at which the new President is to be elected ? Or, on the other hand, does sub-s. (7-A) merely mean that he is intended to preside, but, if he does not, it is only an irregularity which does not vitiate the proceedings and the meeting may elect another Chairman and then proceed to elect the new President ? The learned Judge was quite obviously inclined to the former view. But like the trial Judge he thought he was bound by a contrary decision of this Court in 29 Bom L R 1325.[1] He therefore dismissed the appeal, and a second appeal to this Court was summarily dismissed by N. J. Wadia, J., so that we have not the advantage of any judgment from that learned Judge. 29 Bom L R 1325[1] was a case dealing with S. 27, Bombay Local Boards Act, 6 of 1923, which at the material time ran as follows :

> On the expiry of the term of office of a local Board the President and Vice-President shall continue to carry out the current administrative duties of their offices until such time as a new President and Vice-President shall have been elected and shall have taken over charge of their duties : Provided that in the case of the new Board constituted under this Act, a meeting for the election of a new President shall be called by the President of the retiring Board. The President . . . . shall preside at such meeting and the new Board shall then elect its own Chairman for that meeting and then the meeting shall proceed to elect the new President.

The facts in that case were these. The retiring President called the meeting and attended it and took the chair. He then dissolved the meeting on the ground that one member had not received the notice. Seven members accepted his ruling and left. The others declined to accept his ruling and elected a new Chairman, after which the meeting proceeded to elect a new President. The issues before this Court in the appeal, as stated in Chief Justice Marten's judgment, were whether the meeting was validly convened, whether the retiring President had power to dissolve the meeting, and whether the fact that seven members left after he had pronounced the meeting dissolved affected the subsequent proceedings. The point that the election of the Chairman was illegal, because the retiring President was not in the chair when he was elected, was not taken. It is always unsafe to presume that a point not argued or considered has been decided by the Court by implication. If this point had been taken, the answer would probably have been that the retiring President was in the chair, or at any rate the requirements of the section had been substantially complied with. Marten, C. J.'s statement of the facts on which this Court decided the appeal is this (p. 1329) :

> As I read the learned Judge's judgment, the Chairman never in fact left his chair, or at any rate left the meeting until some time after a new Chairman was elected. Consequently, the seven members proceeded to leave this meeting before it had really broken up and before at any rate the Chairman had properly left his chair.

The retiring President's right under S. 27 is to convene the meeting and to be present and preside till the election of a Chairman. In this case he had convened the meeting ; he was present ; he had not 'properly left the chair' until after the Chairman was elected. Under the circumstances it cannot be suggested in my opinion that this Court took the view that it was immaterial whether the retiring President was in the chair or not. I do not therefore consider that this case can be regarded as an authority on the question which has to be decided in this appeal. It is a rather curious fact that sub-s. (7-A), S. 23, District Municipal Act, was inserted by Act 26 of 1930. It substantially reproduces S. 27, Local Boards Act, as it originally stood. The latter section was amended by Act 4 of 1930, and in its amended form it allows the retiring Vice-President or the Chief Officer to preside in the absence of the retiring President. But the old form of the section was retained when it was incorporated in the Municipal Act. It must be presumed, I think, that this was intentional, and that appears to show that it was the intention of the legislature that the retiring President only and no one else should have the right to preside. The contention of the learned counsel for the appellants here is that the clause in question confers on the retiring President the exclusive right and privilege of convening the meeting and presiding until a new Chairman is elected for the meeting. In my opinion this contention is right. It appears to me to be the natural meaning of the language used in sub-s. (7-A). The meaning appears to be that the retiring President is an integral part, or that his presence in the chair is an integral part of the machinery for the election of a Chairman at the meeting at which the new President has to be elected. I cannot regard it as a reasonable construction of this provision to hold that it is a mere matter of procedure which can be disregarded without affecting the validity of the proceedings.

I propose to refer only very briefly to the cases which have been cited in argument, because it is primarily a matter of construction of the language used by the Legislature, and cases which do not deal with the same or precisely similar language are not really of very great assistance. In (1807) 8 East 389[2] it was held that if a presiding officer, who by the constitution of the Borough forms an integral part of an elective assembly, departs from it after the meeting has been regularly formed and the election entered upon but before it is completed, an election made after his departure is void. *A fortiori* it would seem to be so if he is not present at the election at all. (1813) 2 M & S 141[3] followed this case and is to the same effect. It was held there that where the presence of any party is required at an election, he must be personally present at the time when the election is declared. Then in (1724) 11 East 84*n*[4] Fortescue, J. in the course of his judgment said (p. 87) :

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[1] **Gopal v. Sanmukhappa, A I R 1927 Bom 603 =106 I C 265=29 Bom L R 1325.**

> .... the Mayor is the person who is to preside, and as the Mayor has a power to refuse to meet, it is as illegal to proceed after he breaks up and leaves them, as if they should proceed without being assembled by him .....

These are clear authorities in support of the proposition argued for by the appellants, at any rate if the retiring President is to be regarded as an integral part of the machinery for the election of the Chairman, as in my opinion he must be. The case in (1809) 11 East 77[5] has, in my opinion, very little application to the facts of this case. The *ratio decidendi* there was that the Mayor had left without objection after dissolving the assembly ; no notice was given in any way that the rest of the assembly would proceed to elect a Mayor and so, in the language of Lord Ellenborough (p. 90) :

> This silence and acquiescence at the time of those who afterwards proceeded to make an election, operated as a surprise and fraud upon the other electors; and therefore the election made by them under such circumstances cannot be borne out by the statute.

No such question as that arises in the present case. There was also a point as to the competence of the presiding officer. As to that Lord Ellenborough said (p. 90):

> Assuming it to be clear (though the point has never been judicially decided) that an election begun under one presiding officer, as by the nomination of the two persons out of whom the burgesses were to choose one, could be completed by such choice made under another, after the departure of the first, and the breaking up of the meeting, as far as depended upon the act of the first presiding officer, the question still remains whether the election of the defendant, under the circumstances which took place on this occasion, can be supported.

He then went on to deal with the other facts which were entirely different from those in the present case. But Bayley, J. made some observations on this point, to which Mr. O'Gorman for the respondents has drawn our attention. He said (p. 92) :

> I think it is extremely probable that the intention of the Legislature in this statute was that in case of the Mayor's absenting himself during the election, the next in place and order to him might preside and go on with it, and that the wrongful act of the Mayor in going away pending the proceeding would not defeat an election afterwards made by the body.

Now that was a perfectly natural view to take on the language of the statute which had to be construed in that case, for the statute there expressly provided that if the Mayor absented himself, the person next in place and office to him should hold the Court or preside in the meeting and have the same power and authority in all respects as belongs to the Mayor. (1809) 11 East 77[5] is no authority for the view that the election of plaintiff 5 was a valid election, having regard to the language of the statute applicable to our case. Mr. O'Gorman has distinguished these English cases or suggests a distinction on the ground that in them or most of them the Mayor or other person concerned was under the statute a part of the elective body, and the result of the procedure followed was that the officer was deprived of his vote. Under S. 23, sub-s. (7-A) of Bombay District Municipal Act, the retiring President has no vote. His right is only to preside and in the case of an equality of votes, to determine the manner in which lots are to be drawn. The distinction is not in my opinion material. I think the principle must be the same whether the person concerned is by statute made a member of an elective assembly or body, or whether the statute makes him an integral part of the machinery for an election. 28 Bom L R 1184[6] has been relied on for the respondents. That was a case under S. 26, sub-s. (5), Bombay District Municipal Act. There had been no breach of any provision of the statute and nothing was decided which bears upon the present issue. The Court held that S. 38 of the Act covered the case of the irregularity, if any, in continuing the Chairman as the Chairman of a general meeting after the President was elected. Mr. O'Gorman has argued that the provisions of S. 38 might be applied to this case also. That section says this :

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[2] The King v. Buller, (1807) 8 East 389.
[3] The King v. Williams, (1813) 2 M & S 141.
[4] Machell v. Nevinson, (1724) 11 East 84*n*.
[5] The King v. Gaborian, (1809) 11 East 77.
[6] Basaya v. Murgaya, A I R 1926 Bom 576=98 I C 454=28 Bom L R 1184.

> No disqualification of, or defect in the election or appointment of, any person acting as councillor, or as the president or presiding authority of a general meeting or as chairman of a committee appointed under this Act, shall be deemed to vitiate any act or proceeding of the Municipality or of any such committee, as the case may be, in which such person has taken part, whenever the majority of persons, parties to such act or proceeding, were entitled to act.

This section comes in Ch. 3 of the Act which deals with the conduct of business. It is conceded that it will ordinarily only apply in the case of proceedings of a duly constituted Municipal Board after the election of its President and other officers. The section, in my opinion, cannot apply to a case like the present. So far as it is relevant to the present case, the only defect which would be cured by it would be a defect in the election or appointment of the presiding authority of a general meeting or Chairman of a committee appointed under the Act. Now the meeting at which plaintiff 5 was elected President was not a general meeting. S. 26 of the Act shows what are general meetings of the Municipality. Four ordinary general meetings are provided, and special general meetings may be summoned by the President whenever he thinks fit, and must be summoned by him upon the written request of not less than one-fourth of the Councillors. But the meeting of 6th November 1934, was neither an ordinary nor a special general meeting within the terms of S. 26. Obviously it was not a meeting of a committee. In my opinion the provisions of S. 38 cannot be applied in the case of a preliminary meeting which is held before the Municipality is properly speaking constituted at all. That case must be governed by the express provisions contained in S. 23 (7-A), and having regard to those provisions it could not be said that apart from the defect in the election of the Chairman, the majority of persons were entitled to act as they did.

Then Mr. O'Gorman argued that the retiring President has merely ministerial functions to perform. He has to convene the meeting, but the moment he has convened it, the members summoned become seised of all powers. The powers of the retiring President are at an end. No doubt the clause says that he has to preside, but if he does so he is absolutely in the hands of the members. Therefore the argument is that the words 'shall preside' are not to be taken as mandatory. I think however that this argument ignores the plain language of the section. It is apparently conceded, and at any rate it is I think clearly the case, that the retiring President must convene the meeting. No other person has power to do that, and I can see no reason why the words 'shall preside at such meeting' should be given any less mandatory effect than the preceding words 'shall be called by the President.' Then lastly reliance was placed on a passage in Maxwell's Interpretation of Statutes, Edn. 7, p. 321 :

> On the other hand, where the prescriptions of a statute relate to the performance of a public duty, and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or in other words, as directory only.

Mr. O'Gorman suggested that very serious consequences might ensue if the election of plaintiff 5 were held not to be valid. I see no reason to suppose that that will be so, and it seems to me that that is precisely the difficulty which S. 38 of the Act is intended to meet and does meet. I have already pointed out that defendant 2, who was elected President at the meeting called by the Collector, acted as such until the decision of the appeal by the District Judge, when he was displaced by plaintiff 5. For all these reasons I hold that the plaintiffs have failed to show that plaintiff 5 was validly elected, and that they are not entitled to the reliefs claimed by them in the suit. The result is that the appeal must be allowed and the suit dismissed with costs throughout.

Tyabji, J.—The question in this appeal is whether the election of the fifth plaintiff as the President of the Municipality of Bhiwandi-Nizampur, alleged to have taken place on 6th November 1934, was valid and binding on the defendants. The election is said to be invalid on the ground that the procedure followed at the time of the election was in contravention of

S. 23, sub-s. (7-A), Bombay District Municipal Act, 3 of 1901. That sub-section provides that on the expiry of the term of office of a Municipality, in case a new Municipality is constituted under the Act, a meeting shall be held for the election of a new President. Three duties are cast by the proviso to the sub-section upon the President of the retiring Municipality: (1) to call a meeting for the election of a new President; (2) to preside at such meeting until such meeting elects its own Chairman for that meeting; and (3) in case of an equality of votes in regard to the election of such Chairman, the result of his election has to be decided by lot, in which event the retiring President has to be present while this is being so decided, and he has to determine the manner in which the lot shall be drawn.

The provision of this sub-section that has not been given effect to is the second provision, which requires that the retiring President shall preside at the meeting called for the election of a new President for the short time taken by the new Municipality in electing its own Chairman for that meeting. That this is an extremely small and unimportant part of the business to be transacted, seems clear. In a great number of meetings the Chairman or President is elected without anybody being in the chair while the election takes place. That seems to have happened in the present case. I also observe that in the powers given and the duty cast upon the Collector under sub-s. (10) of S. 23, no reference is made to the second of the three functions cast under sub-s. (7-A) upon the retiring President: sub-s. (10) provides that the Collector may exercise the powers of the President for the purpose of calling such meeting, but does not provide that the Collector shall preside over the meeting while the meeting elects its own Chairman.

While it must be admitted that the second of the three functions of the retiring President may in many cases be extremely unimportant, that the absence of the President may be overlooked (as it was in the present case) and that the new Municipality may consider that it can elect its Chairman for that meeting without any Chairman presiding over the meeting while it elects its own Chairman, yet I cannot overlook the fact that S. 23, sub-s (7-A), in terms makes it necessary for the meeting to have a Chairman while it elects its Chairman for the ensuing meeting, that the retiring President is required to preside over the meeting for the time being, and that the three functions to which I have referred (which taken together cannot be considered to be unimportant) are stated as though they all stood together. They are apparently placed on a common footing. The terms of the sub-section are mandatory. That the provision that the retiring President shall preside while the meeting elects its own Chairman has been violated in the present case cannot be denied. The question then arises whether there is anything in the Act by which the disregard of this provision may be condoned.

Our attention was drawn in this connexion to S. 38. That section does not however excuse the disregard of the second of the three provisions to which I have referred. S. 38 provides for the condonation of certain disqualifications or defects that may otherwise vitiate any act or proceeding of the Municipality or of any committee appointed under the Act. Its provisions are restricted in several ways: first, the disqualification or defect must have reference to some act or proceeding of the Municipality (a) at a general meeting or (b) at a proceeding of a committee appointed under the Act. The expression 'general meeting' is explained in S. 38, and there is no doubt that the meeting for the election of the President does not fall within the terms of that definition. Nor can it be said that this was a meeting of a committee appointed under the Act. Secondly, what S. 38 cures is something that arises out of persons taking part in such meetings, notwithstanding that the election or appointment of such persons is subject to some disqualification or defect. Here it is not objected that some person has taken part in the meeting who was disqualified or whose election or appointment was defective: what is objected to is that a person did not preside who is required to preside over the meeting—no doubt for a very short time and while a very formal act is being done. But for the time being no one acted as Chairman. Thirdly, the operation of S. 38 is restricted to cases in which the majority of the persons who are parties to such acts or proceedings are entitled to act. Here the new Municipality did an act—elected their Chairman for the meeting—without having the person presiding over their deliberations who is required by S. 23 (7-A) to preside over them. The majority are not entitled to act in this respect: they were not entitled to decide whether they should proceed to elect their Chairman without having the retiring President or any one else in the chair. If the terms of sub-s. (7-A) are considered strictly, then the meeting was not properly constituted for the purpose of electing its Chairman in the absence of the retiring President. The meeting becomes entitled to elect its Chairman only when the retiring President presides at such meeting. S. 38 does not deal with such a case as is under consideration.

Section 22, sub-s. (5) was not cited to us in argument. It provides for irregularities and informalities relating to elections. There is no similar provision relating to irregularities and informalities in the proceedings at the meeting called for the election of a new President of a new Municipality, nor any other provision whose aid may be taken for curing the omission to follow the procedure laid down in sub-s. (7-A) of S. 23. We have then two sections in the Act intended to cover cases in which irregularities may be condoned, and this particular irregularity with which we are concerned is not included in either. To this I would add that the retiring Vice-President is expressly mentioned in the paragraph of sub-s. (7-A) immediately preceding the provision which has been disregarded; the omission to refer to the retiring Vice-President in the paragraph with which we are concerned would imply that the retiring President's function was deliberately excluded even from the competence of the retiring Vice-President who would otherwise naturally undertake its performance. Then again the action of the legislature in respect of the amendments made in the District Municipal Act and the Local Boards Act is noticeable. Both Acts were amended in 1930. The Local Boards Act was the first to be amended by Act 4 of 1930. That amending Act was published on 28th April 1930. The amendment had the effect of permitting the retiring Vice-President or the Chief Officer to preside in the absence of the retiring President on the occasion in question. Then, five months later, the District Municipal Act was amended. The latter amendment was published on 23rd September 1930. It introduced in the District Municipal Act the provision of the District Local Boards Act not as it became after its amendment five months before but as it stood before that amendment, i. e., without authority to the retiring Vice-President or any other person to take the chair in the absence of the retiring President.

While, therefore, there is no provision by which the infringement of sub-s. (7-A) of S. 23 may be condoned, there is considerable material for holding that the legislature deliberately omitted to make such a provision. The cases that were cited to us have been dealt with by my learned brother. It seems unnecessary for me to refer to them in detail. I will only say that the English cases cited seem to me to be inapplicable. They do not deal with facts and conditions similar to those with which we are concerned. They either refer to provisions for the election of the Mayor or other functionaries, in cases in which the elective body is not complete without the presence of the person who was absent, or are based on legislative provisions or ancient customs or charters which make the position materially different. Under the District Municipal Act the retiring President is not necessarily entitled to vote at the election of the new President. The retiring President may not be a member of the newly elected Municipality which is about to elect its President.

In 29 Bom L R 1325,[1] the question whether the election of the Chairman of the meeting called to elect the President for the ensuing three years could be held in the absence of the retiring President in the chair, was not directly considered. The point that was considered was whether the retiring President had the power of dissolving the meeting. It seems to me, therefore, that the question we have to decide has not been covered by the decision in 29 Bom L R 1325,[1] nor in any of the cases that have been cited to us. My conclusion is that the provisions of S. 23 (7-A), that the President of the retiring Municipality shall preside at the meeting called for the election of a new President while the meeting elects its own Chairman for that meeting, has not been given effect to, and that there is nothing in the Act empowering that defect being cured or overlooked and the proceedings being held good in spite of its contravention. For these reasons I agree with the order proposed by my learned brother.

S.C./D.S. *Appeal allowed.*

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BROOMFIELD AND TYABJI, JJ.

Khangouda Shivangouda — Appellant.

v.

Secy. of State and *others*—Respondents.

First Appeal No. 241 of 1931, Decided on 31st July 1936, against decision of Addl. First Class Sub-Judge, Dharwar, in Special Civil Suit No. 47 of 1930.

(a) Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 — Jurisdiction of civil Court—Adoption of person declared invalid by civil Court—His name, though already entered in Revenue registers as watandar, removed from it on this decision—Suit by such person for title to and possession of watan lands is barred under S. 4 (a), Cls. (1), (3) and (4) of the Act.

Where a person's name is entered in the Revenue registers as heir to the deceased watandar, in his capacity of adopted son of the deceased, but subsequently the adoption is declared invalid by the civil Court and his name is removed by the Revenue authorities as by invalidity of his adoption, he becomes a stranger to the watan, a suit for title to and possession of the watan lands in a civil Court is barred under: (a) S. 4 (a), Cl. (1) of the Act, inasmuch as the claim is against Government relating to property appertaining to the office of a village Patil; (b) S. 4 (a), Cl. (3), as there being no grounds to declare the orders of Revenue authorities to be ultra vires; and (c) S. 4 (a), Cl. (4), as being a claim against Government pertaining to land declared by Government to be held for service. [P 122 C 2; P 123 C 2]

(b) Bombay Hereditary Offices Act (3 of 1874), Ss. 10, 11 and 11-A—Meaning of word 'alienation' in S. 11 is not restricted to transfer or conveyance by watandar himself —It includes also passing of watan property into ownership or possession of person not legally entitled to watan — Revenue authorities have power to annul such alienation under S. 11 and resume lands under S. 11-A.

The meaning of the word 'alienation' as used in S. 11 of the Act, is not restricted to a transfer or conveyance by a watandar himself. It includes the passing of watan property into ownership or beneficial possession of any person other than the officiator or a person not watandar of the same watan. If therefore watan property passes into the hands of a person whose adoption is subsequently declared invalid, though without any conveyance, there is equally an alienation from the watan family. [P 123 C 1]

The Revenue authorities have therefore power to annul such an alienation under S. 11 of the Act and resume the watan lands under S. 11-A. [P 123 C 2]

(c) Bombay Hereditary Offices Act (3 of 1874), Ss. 34 and 36 (3)—Adoption by widow of watandar declared invalid—Word 'decree' in S. 34 is not confined to decree setting aside adoption but includes also finding in judgment that adoption is invalid—Revenue authorities have therefore power under Ss. 34 and 36 (3) to remove name of person from register, whose adoption is declared invalid.

Word 'decree' in S. 34 must be deemed to include the judgment on which the decree is based and therefore where in a judgment certain adoption is declared invalid, 'decree' is not restricted to a decree setting aside adoption but includes also a finding to that effect in a judgment. [P 123 C 2]

Where on adoption by a widow of a watandar the name of the adopted son is entered in the Revenue registers in place of the deceased watandar and subsequently the adoption is declared invalid by the Court:

Held: that the Revenue authorities had jurisdiction under Ss. 34 and 36 (3) of the Act to remove the name of such person from the registers. [P 123 C 2]

S. V. Palekar — for Appellant.

P. B. Shingne and *R. A. Jahagirdar*—for Respondents 1 and 3.

Broomfield, J.—The plaintiff has appealed against the dismissal of his suit against the Secretary of State for India and other defendants, for a declaration of his title to and for possession of patilki watan lands in village of Hulgur. The material facts are these: Fakirgouda, the former holder of the watan, died in about 1877 leaving three widows, Fakirawwa, Shanavirawwa and Savakka. The last of these gave birth to a posthumous son Fakirgouda, who however died shortly after his birth. After his death Fakirawwa made two adoptions. She adopted one Chanaviragouda in 1901 and the plaintiff in 1908. The plaintiff was put in possession of the property of Fakirgouda and the Revenue authorities recognised his adoption and entered his name in place of Fakirgouda as one of the representative watandars. That happened in 1909. In 1920 Chanaviragouda brought a suit against the plaintiff claiming the property as the adopted son of Fakirgouda. An issue was raised in that suit as to the fact and validity of both adoptions, viz., of Chanaviragouda and of the present plaintiff, and the Court held that both adoptions were proved, but both were invalid. The suit was accordingly dismissed, and the decree was confirmed in appeal by the High Court. However, the plaintiff continued in possession of the property, but in 1926 the present defendant 4 relying on the decision of the civil Court applied to the

Revenue authorities for restoration of the watan lands to him as the heir of the second Fakirgouda.

It is desirable to set out much more clearly than the trial Judge has done the actual orders which were made by the Revenue authorities. On 22nd September 1926, the District Deputy Collector, on the application of the present defendant 4 and in view of the decision in Chanaviragouda's suit and the confirmation of that decree by the High Court, decided that the present plaintiff was a stranger to the watan. He therefore held that the alienation of the lands to him was null and void under S. 11, Watan Act. He also made an order that his name should be struck out of the register. On 27th June 1927, the Commissioner, on the recommendation of the Collector, cancelled the order of 29th June 1909, by which the plaintiff's name had been entered as the adopted son of the former watandar. At the same time the District Deputy Collector was ordered to hold a fresh inquiry for determining who was entitled to be the representative watandar and to hold the land. Final orders were passed on 10th April 1929, when as the result of the inquiry the District Deputy Collector ordered that the lands should be restored to two members of the watandar family who are defendants 2 and 3 in the present suit. This order of the District Deputy Collector was confirmed in appeal by the Collector in June 1929. The suit was tried by the Additional First Class Subordinate Judge at Dharwar. He has held that the orders of the Revenue authorities setting aside the alienation and resuming the land and removing the plaintiff's name from the register are ultra vires, but he dismissed the suit on the ground that it was barred by S. 4 (a), Revenue Jurisdiction Act. In this appeal the learned advocate for the plaintiff naturally supports the findings of the trial Court in his favour, and he contends that as the orders of the Revenue authorities were ultra vires, the suit is not barred by the Revenue Jurisdiction Act. The learned Government Pleader who appears for defendant 1, the Secretary of State for India, argues firstly that the suit is barred by S. 4 (a), Revenue Jurisdiction Act in any case, and secondly that the orders of the Revenue authorities were not ultra vires. In our opinion the learned Government Pleader is right on both points.

The suit apparently comes under S. 4 (a), Cl. 1, Revenue Jurisdiction Act, that is to say, it must be regarded as a claim against Government relating to property appertaining to the office of a village patil. It also apparenty comes under Cl. 4, sub-s. (a), that is to say, it must be regarded as a claim against Government relating to land declared by Government to be held for service. The lands in suit are described in the pleadings as patilki service watan lands and it appears from the judgment that it was not disputed at the trial that they are service lands. S. 4, Revenue Jurisdiction Act, enacts that no claim against Government of this kind can be entertained by civil Courts. It is not as if Government were merely a formal party. Plaintiff claims relief against Government, i. e., restoration of possession. The question whether the orders of the Revenue authorities were ultra vires or not does not arise in connexion with these provisions in S. 4 (a). That question only arises where a suit comes under Cl. 3, S. 4 (a) which relates to suits to set aside or avoid any order under the Watan Act passed by Government or any officer duly authorized in that behalf. However as the question of the validity of the orders passed by the Revenue authorities is of some importance and as the learned trial Judge's finding appears to us to be wrong, I will briefly deal with it. Two separate orders have been held to be ultra vires, viz., the order annulling the alienation under S. 11, Watan Act, and the order removing the plaintiff's name from the register of representative watandars. S. 11 provides that when any alienation of the nature described in the preceding section shall take place otherwise than by virtue of a decree or order of any British Court, the Collector shall after recording his reasons in writing, declare such alienation to be null and void, and when he does this he has power under S. 11-A to resume possession of the property. The trial Judge has held that there was no alienation of the property and therefore the Collector had no power to resume the land. According to him the word 'alienation' implies a transfer or conveyance by a watandar to a stranger. He says at p. 4:

> **The express prohibition is against alienation only and that term has a meaning which is generally accepted and that meaning does not include the passing of the property into the hands of a trespasser.**

I can see no justification for placing this narrow construction on the word 'alienation.' If a watandar conveys watan property to a stranger there is of course an alienation by a watandar, but if watan property passes into the hands of a stranger, though without any conveyance, as for instance, by devolution or usurpation, there is equally an alienation from the watandar family. If a widow of a watandar makes a valid adoption and the property passes to the son, there is no alienation, but the reason is not that there has been no conveyance, but that the person to whom the property passes is not a stranger. If the adoption is not valid, there is an alienation. The meaning of the word 'alienation' as used in S. 11 is, I think, quite obvious if we compare the section with S. 10 to which it refers. Under S. 11 the Collector is required to set aside any alienation of the nature described in S. 10. Now the transactions referred to in S. 10 are transactions where any watan or any part thereof has passed without the sanction of Government into the ownership or beneficial possession of any person other than the officiator, or if the property has not been assigned into the ownership or beneficial possession of any person not a watandar of the same watan. So that what is meant by 'alienation' under S. 11 is only the passing of watan property into the ownership or beneficial possession of any person other than the officiator or a person not a watandar of the same watan as the case may be. No transfer or conveyance by a watandar is necessary at all.

In the present case the Collector's power to set aside the alienation and to resume the property depended simply on the question whether the plaintiff is a stranger to the watan. That again depends upon the question whether he is or is not a validly adopted son of the former holder. There was an issue as to the validity of the adoption and the finding is against the plaintiff. Apparently it was so found on the admission of the plaintiff's pleader that the adoption was invalid. The learned advocate for the appellant has suggested that in view of recent decisions of the Privy Council the adoption may have been valid and the previous decision of the Court incorrect. I may mention here that in addition to Chanaviragouda's suit of 1920 there was another suit brought by the plaintiff himself against defendant 4 in 1928 in which he sought a declaration that he is the validly adopted son of Fakirgouda and his suit was dismissed. Mr. Palekar's argument on this part of the case has not been developed in a way to make it in the least convincing and there are no materials before us on which we could possibly hold that Fakirgouda's widow Fakirawwa had power to adopt the plaintiff. Moreover if she had power to adopt at all, her adoption of Chanaviragouda in 1901 would prima facie be valid also, and that would render the subsequent adoption of the plaintiff invalid. It appears therefore that the Revenue authorities were justified in holding the plaintiff to be a stranger to the watan and the orders annulling the alienation under S. 11 and resuming the lands under S. 11-A were legal orders. As to the order for the removal of the plaintiff's name from the register, the argument for the appellant is based on S. 34, Watan Act, which provides in the first place that the Collector is to register the name of an adopted son of a representative watandar on report of the adoption being made to him, and in the second place that if such adoption be subsequently set aside by a decree of a competent Court, the Collector shall remove such name from the register. The trial Judge holds, and he may be right, that a finding in a judgment that an adoption is invalid is not equivalent to a decree setting aside an adoption, though I think myself that the word 'decree' in S. 34 must be deemed to include the judgment on which the decree is based. But S. 34 does not say that the name of an adopted son can only be removed when there is a decree setting aside the adoption. There is also S. 36, Cl. (3) of the Act which, as amended by Act 11 of 1930, provides as follows:

> If at any time any person shall by production of a decree of a competent Court satisfy the Collector that he is entitled to have his name registered as the nearest heir of such deceased watandar in preference to the person whose name the Collector has ordered to be registered, the Collector may, subject to the foregoing provisos, cause the entry in the register to be amended accordingly.

It would certainly be a strange position if the Collector could declare an alienation null and void and resume the land, and yet should have no power to remove from the register of representative watandars the name of the person held to have no title. Another point to be noted in this connexion is that the original order of 1909 for the entry of the plaintiff's name has been cancelled by the Commissioner's order of 27th June 1927. The effect of that would apparently be that the position is the same as if the plaintiff's name had never been entered at all. As there are no grounds for holding any of the orders of the Revenue authorities to be ultra vires, the suit would be barred under Cl. 3 as well as Cls. 1 and 4, S. 4 (a), Revenue Jurisdiction Act. The appeal must be dismissed with costs. Two sets of costs, one for respondent 1 and one for respondent 3.

K.B./A.L. *Appeal dismissed.*

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BROOMFIELD AND TYABJI, JJ.

Mahadev Heramb Dev—Applicant.

v.

Govindrao Krishnarao Kale and *others*—Opponents.

Civil Revn. No. 134 of 1934, Decided on 30th March 1936, against order of Dist. Judge, Poona, in Misc. Appln. No. 38 of 1933.

(a) Civil P. C. (1908), S. 92 — Scheme—Power given to District Judge under scheme to suspend and remove any trustee for specific reasons—District Judge can very well remove all trustees even for dishonesty or breach of trust — Removal of trustee under scheme for breach of trust is not contrary to S. 92—Power to remove trustee must include power to suspend him.

If the District Judge has power to remove any trustee for unfitness, etc., he cannot remove all of them if circumstances should make it necessary. If he can remove for unfitness, it is difficult to see why he cannot do so for dishonesty or breach of trust. S. 92 does not say that a trustee guilty of breach of trust can only be removed by a suit. A suit may be brought to remove him and any suit seeking that relief must be brought in the manner prescribed in the section. But if a suit has once been brought under the section and a scheme has been framed which provides for the removal of trustees for unfitness, the exercise of that power is not contrary to S. 92, even though the trustee may be unfit by reason of a breach of trust. The power to remove trustee must include power to suspend trustees pending necessary enquiries: *A I R 1931 Bom 391, Ref.* [P 126 C 1, 2; P 127 C 1]

(b) Civil P. C. (1908), O. 40, R. 1—Public Religious Trust — Scheme empowering District Judge to remove any trustee for reasons mentioned in it—He can appoint receiver pending inquiry into breach of trust on part of trustees, in his inherent powers under scheme—Appointment so made is not ultra vires of Civil P. C., though no suit or other proceedings are pending before the Court—Such order not being under O. 40, R. 1 is not appealable.

Where the District Judge has been given a general control over the trustees and over their management of the trust by virtue of a clause framed in the scheme drawn up for the management of a public religious institution, if in the exercise of his powers he finds it necessary to take emergency measures for temporary management of the Board of new trustees on suspension of the old ones for breach of trust, he can appoint a receiver pending inquiry, in his inherent powers under the scheme. The appointment so made cannot be ultra vires of the Civil Procedure Code, even though no suit or proceeding in the nature of suit is pending before the Court when the order appointing receiver is made. Such order though purported to have been passed under O. 40, R. 1 of the Code, is really one passed by the District Judge as the *persona designata* in his administrative capacity and the order therefore is not appealable: *24 Bom 45; 17 All 106 (P C); A I R 1931 Bom 391* and *A I R 1931 Bom 388, Ref.; A I R 1925 P C 155; A I R 1927 Bom 422* and *A I R 1931 Bom 391, Foll.* [P 127 C 2; P 128 C 1]

(c) Civil P. C. (1908), S. 92 — Scheme—Power to alter or modify — Any person interested in the institution can apply to modify scheme even if he was or was not party or representative to suit in which scheme was originally framed.

When a scheme of management of public religious trust provides for its modifications by the Court on application by any person interested in the institution, any person who may from time to time have an interest in the institution whether or not he was party to the suit in which the scheme was originally framed, can apply for modification of the terms of the scheme. The scheme cannot be regarded as a continuation of the suit, at any rate in the sense that applications under the scheme can only be made by parties to the suit: *A I R 1931 Bom 391* and *A I R 1931 Bom 388, Ref.* [P 129 C 1]

D. N. Bahadurji and *B. G. Rao* — for Applicant.

M. R. Jayakar, J. R. Gharpure, G. S. Talpade, G. B. Chitale and *S. Y. Abhyankar*—for Opponents.

Broomfield, J.—This is a batch of civil applications relating to the Chinchwad Sansthan. The history of this institution is given in 15 Bom 612.[1] In consequence of the decree of this Court in that case, a scheme of management was drawn up, which with some modifications made in 1896 is still in force. It vested the management of the institution in a committee of three trustees: one representing the eldest branch of the family of the founder, one selected from among members of that family generally, and the third representing the general body of worshippers. All three of the trustees are nominated by the

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[1] Chintaman Bajaji Dev v. Dhondo Ganesh Dev, (1888) 15 Bom 612.

District Judge, Poona. Cl. 4 of the scheme, which is the most important for our present purpose, is in these terms :

> The said trustees shall hold office for life, but it shall be competent to the District Judge of his own motion or upon the application or representation of any person interested in the said Devasthan to remove from the management any trustee who may be found to be unfit or incompetent for the management of the Sansthan or negligent in the discharge of his duties.

The District Judge has a general control over the management of the establishment by the trustees. His previous sanction is required for compromising suits and for borrowing money. It is provided that the trustees shall furnish to the District Court every year an account of the property and the amounts received, disbursed and invested. The District Judge is required to frame rules for the guidance of the trustees and submit them for sanction of the High Court, and Cl. 27 provides that the scheme shall be subject to such modifications as may be made hereafter by the High Court on the application of parties interested in the Sansthan. At the material time the trustees were Shri Dharanidhar Ganesh Dev, chief trustee, Mr. Mahadev Heramb Dev, second trustee, and Mr. L. R. Gokhale, third trustee.

In April 1932, the District Judge, Mr. Dhurandhar, submitted proposals for amending the scheme which, in his opinion, had proved to be unsatisfactory. Notices were issued to the trustees, but they questioned the power of the District Judge to move the High Court in the matter, and in January 1933, this Court directed that the persons interested in the Devasthan should make applications for amendment of the scheme under Cl. 27. But in the meantime there had been a Government audit of the accounts of the institution and the auditors' report submitted in July 1932 disclosed serious frauds and malpractices on the part of certain clerks employed by the trustees and suggested that there was ground for supposing that the trustees themselves or some of them might have been privy to the frauds. As considerable sums of money were involved, an enquiry was made by the Criminal Investigation Department. On 21st March 1932, the District Judge, who was then Mr. Nanavati, after considering the auditors' report, the report from the Criminal Investigation Department and other matters mentioned at the beginning of his order, suspended the three trustees and appointed Mr. V. P. Raverkar, a retired Subordinate Judge, as Commissioner to carry on interim administration pending a formal enquiry by the District Judge into the question of the responsibility of the trustees for the frauds and the steps necessary for putting the affairs of the institution on a proper footing. Mr. Nanavati considered that he had power to pass these orders under the scheme, but by way of greater caution and also, as he says, to give the persons concerned a right of appeal, he made a separate order on the same date as Judge of the District Court appointing Mr. Raverkar receiver under O. 40, R. 1, Civil P. C.

In view of the action taken by the District Judge, the applications pending in the High Court for amendment of the scheme were not proceeded with and the papers were forwarded to the District Judge for consideration in the course of his enquiry. The District Judge heard the trustees and other interested parties, took evidence and passed final orders on 11th December 1933. He exonerated all three trustees of anything in the nature of breach of trust. But he found that trustee No. 1 had been negligent and had failed to exercise proper supervision over the clerks and that trustee No. 2, by needless quarrelling with trustee No. 3, had hampered the efficient management of the trust to a great extent. He also found that trustees Nos. 1 and 2 had combined to overrule trustee No. 3 who had been doing his best to improve the administration. Trustee No. 3 was exonerated from all the allegations made against him. In the result, trustees Nos. 1 and 2 were ordered to be removed from their position as trustees, while trustee No. 3 was ordered to be reinstated. But as Mr. Nanavati, like his predecessor, was of opinion that the scheme of management required drastic alteration so as to give the District Judge a wider choice in the selection of trustees and in various other ways, he directed that the administration should continue to be in the hands of the receiver pending the disposal of the matter by this Court. Of the applications now before us, Nos. 134 and 135 are in the nature of appeals against the orders of the District Judge suspending and removing trustees Nos. 1 and 2 and appointing a receiver. The others are concerned with various proposals for amendment of the scheme submitted by the District Judge, Mr. Dhurandhar, by the receiver Mr. Raverkar under instructions from Mr. Nanavati, by the three trustees and by other interested persons.

In applications Nos. 134 and 135 three main questions have been presented for our consideration: (1) Had the District Judge jurisdiction under the scheme to suspend the three trustees and after enquiry to remove two of them? (2) Had he jurisdiction to appoint a receiver? (3) If these orders were within his powers, are they justified on the merits? Cl. 4 of the scheme gives the District Judge power on his own motion or on application of any persons interested to remove any trustee for unfitness, incompetence or negligence. Power to remove must, I think, include power to suspend pending necessary enquiries. The District Judge, as his final order clearly shows, found trustee No. 1 guilty of negligence in the discharge of his duties and No. 2 unfit to be a trustee by reason of his quarrelsome and obstructive conduct. Prima facie, therefore, the orders passed were within the powers conferred by Cl. 4. The arguments put forward on behalf of trustees Nos. 1 and 2 to show that the District Judge acted without jurisdiction are based on the construction placed on this clause in the case of some previous orders of the District Judge which came before this Court in revision or appeal.

In Civil Application No. 169 of 1895, an application to remove the trustees had been made to the District Judge, but he had refused to entertain it. This Court agreed with the District Judge and observed as follows:

> We think that the clause was intended to give the Judge a general control over the trustees and over their management of the trust and that it enables him to entertain an application made against trustees appointed under the Scheme and to remove them should he find that they are unfit or incompetent or negligent. In cases of breach of trust however the explicit direction of the law would apply and the complaining party would have to have recourse to S. 539 (now S. 92) of the Code. So far as the present application is concerned we think that the District Judge exercised a right discretion in rejecting it since it is vague and uncertain on the charges of negligence and the greater part of it relates to allegations of dishonesty and fraud which could not be made under the clause in question. On a proper application being made under the clause the Judge will doubtless exercise the jurisdiction.

In Appeal No. 57 of 1897, which was an appeal from a similar order of the District Judge refusing to take action, the Court said:

> On a careful consideration of the wording of Cl. 5 of the scheme of management—(I may mention that at that time the present Cl. 4 was numbered Cl. 5)—we think that its object is to empower the District Judge to remove any particular trustee for unfitness, incompetency or negligence, but that it was not intended to enable him to take upon himself the functions of a Court and to remove the trustees as a body upon charges which virtually amount to charges of breach of trust. No doubt as remarked in the order of the High Court, dated 3rd December 1895, the clause was intended to give to the Judge a general control over the trustees, but we do not think that by that it was meant that he was virtually to try what is in effect a suit in a miscellaneous application such as the present one. If there are any real grounds of complaint against the trustees the applicants can put them forward in the suit, which they state that they are about to file under S. 539, Civil P. C. The time of the Court should not be taken up in preliminary skirmishes for inspection, which should follow and not precede the filing of the suit.

In Appeal No. 175 of 1918 the judgment of this Court is as follows:

> The District Judge was perfectly correct in dismissing this application. The application purports to have been made under para. 4 of the Scheme. But the petitioners in a very long petition make all sorts of allegations against the whole body of trustees of mismanagement and of not complying with the terms of the Scheme. It is quite clear that that is a subject for a regular suit, and cannot possibly be tried as an application under para. 4 of the Scheme. So the appeal must be dismissed with costs.

Relying on these cases the learned counsel for trustees 1 and 2 have contended that the District Judge may remove individual trustees for any of the reasons stated in Cl. 4, but he cannot remove the whole body of trustees. He cannot remove any trustee for anything which amounts to breach of trust and he cannot remove any trustee for unfitness, incompetency or negligence, if anything in the nature of breach of trust is also alleged against him. It can hardly be said that the judgments, which I have just read, go so far as to support the last of these propositions. They do undoubtedly lend some support to the others, though, with the utmost deference to the learned Judges who decided these cases, I find it very difficult to accept them. If the District Judge has power to remove any trustee for unfitness, etc., it is difficult to see on what principle it can be held that he cannot remove all of them if circumstances should make it necessary. If he can remove for unfitness, it is difficult to see why he cannot do so for dishonesty or breach of trust. S. 92, of the Code, as I understand it, does not say that a trustee guilty of breach of trust can only be removed by a suit. A suit may be brought to remove him and any suit seeking that relief must be brought in the manner prescribed in the section. But if a suit has once been brought under the section, as is the case here, and a scheme has been framed which provides for the removal of trustees for unfitness, the exercise of that power is not, in my opinion, contrary to S. 92, even though the trustee may be unfit by reason of a breach of trust. In that connection I may refer to my judgment in 33 Bom L R 520[2] at p. 535. I am certainly not prepared to extend the reasoning in these judgments to cases not precisely covered by them and nothing was actually decided which is inconsistent with the orders passed by the District Judge in the present case. He has not removed the whole body of trustees, but two of them. He has not removed them for breach of trust, as he has found that charge not established, but for negligence in one case and unfitness in the other. In my opinion, that was within his powers.

As for the order appointing a receiver, which the District Judge purported to make under O. 40, R. 1, that has been attacked on the ground that there was no suit or original proceeding in the nature of a suit pending when the order was made, and reliance has been placed on 22 I A 44.[3] One answer to that might be that the suit in which the scheme was framed may be regarded as still pending, as held by Patkar, J., in 33 Bom L R 520[2] and 33 Bom L R 546.[4] That view, I admit, does not appeal to me for the reasons given in my judgments in those cases. Another view which has been suggested is that the appointment of the receiver might be regarded as being made in execution of the decree by which the scheme was set up. That was the District Judge's own view of the legal basis of the order of appointment: *see* para. 18 of his order of 21st March 1933. It is supported to some extent by 24 Bom 45.[5] A receiver may be appointed in execution proceedings under S. 51 of the Code. The difficulty, however, is that there was no application before the District Judge for execution of the decree. I think that the real foundation for the order appointing a receiver must be found in the inherent powers of the District Judge under the scheme. It is common ground, and has been held by this Court in C. R. A. No. 169 of 1895, that the District Judge has a general control over the trustees and over their management of the trust, and if in the exercise of his powers under Cl. 4 he finds it necessary to remove the trustees, he must, in my opinion, be credited with the power to take emergency measures for temporary management pending re-constitution of the board of trustees. I am not prepared to hold that the appointment of a receiver was ultra vires under the peculiar circumstances of the case.

That brings us to the question whether the District Judge's orders were justified on the merits. Before we go to that, it is necessary to consider a preliminary point as to the nature of our jurisdiction. Are we dealing with these applications in appeal or in revision or in what way? In C. R. A. No. 169 of 1895 the opinion was expressed that an appeal lay from the order of the District Judge dismissing an application for removal of trustees. There was no discussion of the point, nor was it actually decided, but the subsequent cases were treated as appeals. On the other hand, in 28 Bom L R 64,[6] a case dealing with the same scheme, this Court held that the District Judge is a *persona designata* and no appeal lies from his orders. The particular order which was challenged in that case was one appointing a trustee under Cl. 3 of the scheme. But, if the reasoning of the judgment is correct, it would apparently apply to an order of removal also. Unfortunately no reference was made to the previous cases, although Macleod, C. J., who delivered the judgment, was a party to one of these. If the District Judge is a *persona designata* under the scheme, as it stands, we obviously could not interfere with his orders, at any rate if they are within his powers. Moreover, even if he is not a *persona designata* but a Court, it by no means follows that orders passed by him in accordance with the powers conferred by the scheme are open to appeal on the merits. The weight of authority seems to be in favour of the view that they are not: 27 Bom L R 872,[7] a Privy Council case; 29 Bom L R 891;[8] 33 Bom L R 520[2] and 33 Bom L R 546.[4] However, as the matter cannot be said to be free from uncertainty, we have not declined to hear arguments on the merits, and indeed it was necessary to do so in order to clear the ground for the applications for amendment of the scheme.

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[2] Chandraprasad v. Jinabharthi, A I R 1931 Bom 391=133 I C 740=33 Bom L R 520=55 Bom 414.

[3] Thakur Pershad v. Sheikh Fakir-ullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (P C).

[4] Kadri v. Khubmiya, A I R 1931 Bom 388=133 I C 823=33 Bom L R 546.

[5] Damodarbhat v. Bhogilal, (1900) 24 Bom 45 =1 Bom L R 509.

[6] Lambodar v. Dharanidhar, A I R 1926 Bom 167=93 I C 195=28 Bom L R 64.

Trustee 1, as representative of the eldest branch of the family of the founder, is not only chairman of the trustees but also ministrant or pattadhikari, i. e., religious head of the institution. He is required to reside in Chinchwad and has religious duties to perform which admittedly take up a great deal of his time. He has stated himself that he regards the performance of these religious duties as his principal function. It appears that in 1923, about the time he was appointed, an attempt was made to allocate the work among the three trustees so as to leave secular matters largely in the hands of trustees 2 and 3, but for some reason or other the resolution of the trustees was not acted upon. Trustee 1, as the person always on the spot and as ex officio chairman of the board, was naturally expected to exercise the necessary day to day supervision of the administration. He appears to have accepted that position; at any rate he took no effective steps to delegate his duties. There cannot be the slightest doubt, in my opinion, that his supervision was very largely perfunctory. As Mr. Nanavati points out in para. 10 of his final order, trustee 1 frequently signed entries in the cash book when the opening balance did not correspond with the closing balance of the previous day. One of the ways in which the dishonest clerks embezzled the funds of the institution was by showing the opening balance as less than the previous closing balance —a simple fraud which a very moderate expenditure of time and trouble would have prevented. There seems to have been plenty of warning. There was a Government audit in 1928-29 in which various irregularities were pointed out, especially on the part of a clerk named Bapat. He was taken back into service in 1930, with the result that he committed further defalcations. Mr. Nanavati finds that trustee No. 1 was mainly responsible for this. There is perhaps some doubt as to his special responsibility in that respect, but a man who occupies the position of chief trustee and accepts the position is well aware of the need for careful supervision, and if he fails to exercise it, he cannot be acquitted of negligence.

For many years past there has been serious friction between trustee No. 2 representing the Dev family and trustee No. 3 representing the general public. In fact the former appears to have carried on a sort of vendetta against the latter and has persisted in bringing all sorts of accusations against him which on enquiry were found to be baseless. He was dismissed once before by the District Judge Mr. Wild in 1926 but reinstated. Mr. Nanavati, who has discussed the matter in great detail in paras. 13 to 20 of his final order, considers that trustee No. 2's foolish and spiteful conduct has hampered the management of the trust and prevented reform. The learned counsel on his behalf has challenged this finding and tried to make out that his client's behaviour was due to his zeal for the institution. As to the practical effects of his quarrel with trustee No. 3 the opinion of the District Judge, who had first-hand experience of the affairs of the Sansthan, is more likely to be right, and certainly the evidence makes it clear enough that trustee No. 2 has faults of character or temperament which make him an impossible member, or at any rate a very undesirable and unsuitable member, of the board of management of this trust. Mr. Nanavati's reasons for suspending the trustees and appointing a receiver are set out at great length in his order of 21st March 1933. Not only was the administration of the Sansthan in a hopelessly chaotic and unsatisfactory state, but also, in view of the facts disclosed in the auditors' report, it was essential to carry out a detailed and protracted enquiry into the conduct of each of the trustees. It was a case of emergency, and it is impossible to say that the steps taken by the District Judge were uncalled for, or that there was any practical alternative.

The only remaining question is whether the District Judge was right in removing trustees Nos. 1 and 2 after the enquiry had exonerated them of dishonesty. We are quite satisfied that he was right in the case of trustee No. 2. We are not satisfied that he was wrong in the case of trustee No. 1. We would only say in the case of the latter that we think the facts established need not necessarily stand in the way of his being reappointed, should the District Judge consider that the safeguards we propose to provide in the amended scheme render that course unobjectionable.

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[7] **Jeranchod v. Dakore Temple Committee, A I R 1925 P C 155=87 I C 313=27 Bom L R 872 (P C).**

[8] **Shridhar v. Ganu, A I R 1927 Bom 422=102 I C 659=29 Bom L R 891.**

Before proceeding to consider the other applications we had to decide a preliminary objection that applications for amendment of the scheme of management can only be made by parties to the suit in which the scheme was originally framed. The argument is based on the opinion expressed by Patkar, J. in the cases to which I have already referred : 33 Bom L R 520[3] and 33 Bom L R 546.[4] I was a member of the Bench which decided those cases and I expressly dissociated myself from Patkar, J.'s view on that particular point. My view, with which my learned brother agrees, is that the scheme cannot be regarded as a continuation of the suit, at any rate in the sense that applications under the scheme can only be made by parties to the suit. Cl. 27 provides for modification of the scheme by the High Court on the application of parties interested in the Sansthan. We think that includes any person who may have an interest in the institution from time to time, whether or not he was a party or is a representative of a party to the original litigation. We, therefore, overrule the objection.

In consequence of the public notices to persons interested in the Sansthan directed to be given by this Court's order of 9th January 1933, the three trustees, a large number of the members of the Dev family and the devotees of the Pot Devasthan of Morgam are now represented before us. The receiver appointed by the District Judge is also represented. Trustee No. 3, who represents the general public on the board, has proposed a large number of amendments of the scheme, but as these are largely based on the amended scheme proposed by Mr. Dhurandhar, in his letter of 14th April 1932, and as Mr. Dhurandhar's scheme has obvious advantages in the way of expert drafting, trustee No. 3 has adopted it as his own. For the sake of convenience we have accepted it as the basis of discussion and have heard arguments for and against it clause by clause. It is common ground that the present scheme requires amendment to bring it up-to-date and to remove defects which have become obvious to all concerned. Most of the changes recommended by Mr. Dhurandhar are admittedly necessary or at any rate desirable improvements. It will only be necessary for me, therefore, to refer to a few important points which are matters of controversy or mark a material departure from the present system. (The judgment then proceeded to discuss the changes to be effected in the scheme and proceeded.) Final orders on the amended scheme will be passed after it has been drawn up and the advocates of parties appearing before us have had an opportunity of perusing it.

Tyabji, J.—I agree. A scheme providing for the administration of the Chinchwad Sansthan, an institution consisting of the Chinchwad Devasthan and three Pot Devasthans, was framed by the High Court in 1890 and has with some alterations been in operation since then. The immediate events leading to the present proceedings consist of a letter dated 9th January 1934, and written by the District Judge of Poona, Mr. Dhurandhar, in which certain alterations in the scheme were proposed under Cl. 27 thereto, and of certain action taken by the successor of Mr. Dhurandhar, the late Mr. Nanavati, in the administration of the institution. Several questions of principle have been raised and argued before us. Our conclusions, stated in detail by my learned brother, depend upon those principles. I will state in my own words the reasons for reaching those conclusions. I need not re-state the facts. It has been the practice of this Court to include in schemes for the administration of charitable institutions clauses providing that the schemes may from time to time and as occasion arises be altered by the Court. The Madras and Rangoon High Courts on the other hand are inclined to hold that schemes cannot be altered after they have once been framed. For the reasons that I shall presently state, I agree with my learned brother that the clause in the scheme before us validly provided for its alteration. When a decree includes a scheme for the administration of a charitable institution, the decree is in its substance very different from the generality of decrees. Decrees ordinarily require a particular act to be done by the defendant for the benefit of the plaintiff, and on that act being done, the decree is completely executed and has performed all its functions. A scheme, on the other hand, provides for continued action in regard to the administration of the charity. It is intended to lay down a plan of a lasting character for the working of the institution. It contemplates a series of acts extending over many years during which its terms are to be put into operation. It must cover a multitude of details. It may have to regulate the conduct of a large and varied staff.

It is easy to understand that the Court may find it impossible to foresee all the events and contingencies in which the trust may have to be administered in future. It may come to the conclusion that it would be unwise to attempt to foresee all the contingencies and to exhaust immediately its jurisdiction in regard to the ordering for all future time of the administration of the trust. It may wish to restrict the scope of its immediate decree —the scheme as actually framed—and at the same time to retain its power to deal with future situations as they arise. This restrained action may be based on past experience leading the Court to expect that situations would arise which cannot be foreseen, but which—if the scheme is to be complete and self-sufficient—must at some time be provided for. The Court may think that the best way of providing for such unforeseen changes in the circumstances would be neither to anticipate them in the imperfect manner in which alone they can be anticipated, nor to drive the parties to a new suit; but to reserve to itself the power of dealing with the altered circumstances i. e., to provide for the administration of the trust in the altered circumstances when they arise. With these considerations in view, the Court may frame the scheme so that it shall operate only for a fixed number of years—say ten years—also providing that the manner in which the trust shall be administered after the expiration of ten years will be considered by the Court after ten years. But other arrangements are also possible. The Court having decided that the scheme in its present form shall operate only for a definite period, that period may be determined not only by reference to the lapse of a fixed number of years but by reference to some other event happening, which event is to serve as a signal that the period has come to an end. Instead of fixing the period by counting the number of years that must elapse after the scheme is framed, it may be provided that the scheme shall continue in operation until the happening of certain events, e. g., until events take place which in the opinion of the Court render the scheme unsuitable or unworkable.

These considerations indicate that though the scheme is purported to be altered, and though apparently the Court reserves to itself a power of amending the decree as embodied in the scheme, the exact nature and form of the powers reserved are materially different. For what is in fact done is this : the Court does not, in the first instance, exercise its power of regulating the administration of the trust for all time but only for a limited period of time. After the expiration of that period, the decree containing the scheme is not strictly altered; it is added to. For in spite of the apparent alteration, the scheme stands for the period during which it has already been in operation, i. e., it stands for the period for which it was intended to stand; and then the scheme (having been deliberately left inchoate) is carried a step further towards completion, by additions providing how the trust is to be administered during the period that is next to succeed. I have spoken of additions, not alterations; for the scheme, after what is called alterations, consists of two parts : Part 1 consists of the original scheme which was in operation for the first period. Part 2 consists of the altered scheme which is to operate for the second period. Part 2 is purely an addition. Part 1 stands as it was. The Court in this manner exercises its jurisdiction in regard to the regulation of the trust for this second period for the first time ; the original scheme having been *ex hypothesi* restricted in its operation to the period that has already come to an end, the Court does not go back upon anything that it has already decreed. It merely carries the scheme forward in regard to a period of time for which it had not given its directions. Far from disregarding the provisions of the original decree, the Court on the subsequent occasion follows what had been laid down on the earlier occasion. This last consideration is of some significance as it has been suggested that by altering the scheme the Court alters its own decree without following any recognized procedure such as appeal or review. In my opinion, the true analogy is not that of appeal or review but an adjournment. The Court abstains from anticipating events and provides for the necessary decision being given when the occasion makes the decision necessary. But after all it is only an analogy. For, as I have before stated, a scheme is a very peculiar form of decree.

For these reasons, I agree that if the scheme is now properly before us, we may proceed to consider the proposed amendments. Secondly, the clause providing for the alteration of the scheme may, in my opinion, be in such terms as to enable persons other than the original parties to the suit to apply to the Court ; and the scheme may be altered on the application of the persons authorized by the scheme to apply, even if those persons were neither parties to the suit in its inception nor subsequently made so by order of the Court. If my previous reasoning is correct, this seems to follow from the Court having provided for the administration of the trust only for a limited period, and reserved its power to alter the scheme in respect of the ensuing period. For, the Court, at the time when it first frames the scheme, has already heard all the parties entitled to be heard. It is accordingly seized of jurisdiction to frame a scheme that is to last in perpetuity. It, however, stays its hand. It does not do all that it has jurisdiction to do. It provides for the administration of the trust only for a limited time. At the expiration of that limited time it proceeds to exercise its unspent jurisdiction and provides for administration during a further period of time. Since the Court had, in the first instance, not pronounced (as it could have done) its complete judgment, it may at the subsequent stage carry its inchoate judgment towards completion without any further step or proceeding or application. In its initial judgment, however—in the judgment formulating the scheme Part 1—it may be provided that the Court will not proceed to pronounce its further judgment—the scheme Part 2—unless an application is made. The application and the consequent proceedings must of course not contravene the law of evidence or procedure. The Court cannot allow its judgment to be affected by matters of which the law does not permit it to take cognizance, or which are not brought to its cognizance in the manner laid down by law. But subject to this it may resume the exercise of its still unspent jurisdiction. It has not only the power but the duty to carry its incomplete judgment a further step towards completion ; though it may leave it still incomplete so that the same process may be carried through at a subsequent stage.

It is important to keep in mind the basis of the argument that the original scheme must operate unaltered for all time. The basis of that argument is that the administration of the trust for all time has been already provided for : and this implies that all the forms and procedure necessary for enabling the Court so to provide have been duly observed. If so, the Court was already authorized to provide for the administration of the trust during the subsequent period. At that subsequent stage, though the Court in form alters the scheme, what it does in reality and in substance is not to alter but to add to the scheme so as to provide for administration during a period for which the scheme as originally framed had not provided, though even in the first instance the Court had acquired jurisdiction to deal with this second period.

Clause 27 in the present scheme is to the effect that:

> This scheme shall be subject to such modifications as may be made hereafter by the High Court on the application of parties interested in the said Sansthan.

With reference to the question whether the scheme may validly provide that an application for its amendment may be made by persons who were not parties to the suit in which the scheme was framed nor were representatives of those parties, there has been a difference of opinion between my learned brothers Broomfield and Patkar, JJ. I agree with the view that the scheme may validly contain such a provision. The Civil Procedure Code does not, it is true, provide as R. 26 of the Rules of the Supreme Court of England, O. 42, does, under which in England any person though not a party to a cause or matter, in whose favour an order is made, is entitled to enforce obedience to such order as if he was a party to such cause or matter. But the Civil Procedure Code does not exclude the application of such a rule in India : *see* 34 Bom L R 670[9];

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[9] Rustomji v. Fazal Rahim, A I R 1932 Bom 378=138 I C 832=34 Bom L R 670.

and unless there is some express authority invalidating such a clause as is now in question, there is no reason for disregarding it. The Privy Council in the cases to which I will presently refer seem to proceed on the same basis. It seems to me, therefore, that the clause must be given effect to in accordance with its terms, and that accordingly any person interested in the Sansthan may apply for an alteration in the scheme.

Another set of questions argued before us depends upon the nature and validity of the power that the scheme purports to give to the District Judge at Poona to remove the trustees. It is suggested that the Court cannot confer such a power because by doing so the scheme is brought into conflict with S. 92, Civil P. C. I agree generally with the view expressed by my learned brother in this respect. That view seems to gain support when the nature of the decree and the terms of S. 92 are considered. There is no difficulty that I can see in the way of the scheme providing that the trustees or other persons holding office under the constitution framed by the scheme shall hold office on particular terms. The Indian Trusts Act does not, of course, in terms apply. I refer by way of analogy to the general conditions on which trustees may be appointed and may hold their office. S. 71, Cl. (c), Trusts Act, specifically provides that the trustee may be discharged from his office by such means as may be prescribed by the instrument of trust. On principle I see great difficulty in holding that a person who accepts office under the scheme for the management of a charitable institution, should be considered not to be bound by the terms of his appointment as laid down in the scheme. The scheme may, it cannot be denied, provide that a trustee shall hold office for a fixed period of time, say for five years. A trustee so appointed could not at the end of five years refuse to give up his trust, and contend that he cannot be removed from the trust except by a suit brought under S. 92, Civil P. C. I do not see any difference in principle between the trustee being held to the condition that he shall hold office during a term fixed by the efflux of time, and his being held to the condition that he shall hold office for a period determined by the decision of another person—say the District Judge—who in the administration of the trust is clothed with the specific power of deciding when the trustee shall be discharged from his office. It seems to me therefore that, apart from S. 92 which I will presently consider, on principle there is nothing to render invalid a provision in a scheme that a trustee may be dismissed or discharged from his office by any person: and that that person may be the District Judge or the author of the trust or any other person.

Turning to the Civil Procedure Code, S. 92, it determines who may institute suits seeking the reliefs specified therein and in which Court such suits may be instituted. The section comes into operation only in case one of the two stated conditions is satisfied, viz., (1) on an alleged breach of any public charitable or religious trust; or (2) when directions of the Court are deemed necessary for the administration of such a trust.

If a scheme is so drafted as to make directions of the Court unnecessary or to preclude breaches of trust, or at any rate, to provide fewer opportunities for breaches of trust, I presume it would not be suggested that the scheme offends S. 92. Nor can the validity of the scheme be, in my opinion, endangered if the scheme provides for a constitution which makes it unnecessary to obtain some of the specified reliefs, and consequently make it unnecessary to institute suits for obtaining those reliefs. This is what the present scheme does. It provides for a means of removing a trustee without recourse to the Court. This is very far from saying that the functions and authority of the legislature may be usurped by a decree providing that where the assistance of the Court is necessary, recourse may be had to the Courts in a manner or through a procedure not permitted by the legislature. The scheme does not attempt to usurp those powers, unless it attempts to make the Court exercise a new jurisdiction not conferred on it by the legislature; or to exercise an existing jurisdiction but in a manner dictated by the scheme and not in accordance with the dictates of the legislature. I shall presently proceed to deal with this aspect of the functions and powers of Courts. But subject to it the position already reached may be stated in these terms: that a scheme providing a means for the removal of a trustee without recourse to the Court does not offend any law, and that the Civil Procedure Code,

S. 92, does not render invalid or ineffectual a clause that the trustee may be removed from his office by the District Judge of his own motion—I speak of the District Judge as an individual, not the District Court, for reasons with which I shall a little later deal more fully.

It follows from what I have stated that, in my opinion, the District Judge was validly empowered to remove the trustees. By implication he had power to suspend them and to appoint a manager to act during the period that the trustees were under suspension. My learned brother has dealt with these powers being implied in the power to remove, and I have nothing to add to his observations. Part of the discussion with reference to the action taken by the District Judge in the administration of this trust depends, in my opinion, on an oversight of the distinction between the District Court and the District Judge as an individual. I must here revert to the facts that when the matter comes before the Court for framing a scheme for the administration of a charity, the Court is completely seized of the subject, and may provide for the charity any constitution that it may deem proper in view of the nature, origin and objects of the particular trust; but that the difficulties in the way of framing a finally complete and perfect scheme incapable of improvement makes the Court hold its hand, and a scheme is consequently framed which is to operate only for a limited period; leaving the scheme which is to operate for the next succeeding period to be settled at a future date. In another direction also, it seems to me, similar considerations may prevail. The Court may consider that the administration of the charity ought not to be completely made over to trustees holding independent authority, but that some control ought to be exercised over them by a person whose voice would carry authority and in whose judgment the Court has special confidence. It may choose a judicial officer for the exercise of such control. When a judicial officer, such as a District Judge, is selected to perform such functions, in my opinion, the real nature of his authority in the administration of the charity is not judicial but similar to that of the trustees. What the Court in fact does is this: The sum total of the authority and functions in connexion with the trust is split up. Only a part of those functions—a very large part—is conferred on the persons styled trustees. The residual authority—a small but improtant part—consisting of a power to control the trustees—by removal or in other ways — is vested in the judicial officer. It would perhaps make the situation clearer if the judicial officer, when entrusted with such functions, were designated by some such distinctive name as 'referee,' and not spoken of as Judge. This would serve to emphasize that he acts in an administrative capacity under the scheme, and not in his judicial capacity as the presiding officer in a Court established by the legislature. The fact need not be disguised that he is selected to perform this administrative function by reason of his being a Judge, and therefore obviously qualified for the particular function.

It is difficult to see how the Court can go beyond what I have stated. The Court cannot confer a new jurisdiction upon the District Judge or any other person, even though he be a judicial officer or direct him to exercise his judicial functions except in respect of matters brought before him in the form and manner provided by the adjective law, ordinarily by instituting a suit. The Court cannot empower a particular person to present matters to a judicial officer for adjudication, except in accordance with the law of procedure which civil Courts are required to observe when they perform the duty of adjudicating upon matters duly brought before them. Nor can I see how the Court can, by the form or terms of the scheme, provide that there shall be an appeal, or that there shall not be an appeal from the decision of the judicial officer. The cropping up of this question—whether the decision is appealable — is perhaps the most practical form in which these principles operate on the case before us. Here again it must be borne in mind that by the reasoning I have followed, judicial functions have already been put apart. The scheme may allot or distribute administrative powers needed to be exercised in the conduct of a charitable institution. It can neither create judicial powers nor provide that they shall be exercised in a particular manner.

It may seem that the existence or absence of an appeal from the decision, or what is treated like appellate powers, is an indication whether the decision is judicial or administrative. But that does not seem to be the case for the reasons that I will endeavour to state. A Court exercising appellate jurisdiction may in effect retain to itself—just as it may confer on a subordinate judicial officer—powers with regard to the administration of the trusts, the appellate Court may assign to itself in the scheme the position of a referee — to use the term I have just mentioned—and then a part of this function, or some duty, ministerial or otherwise, connected with the functions of the referee, may be delegated to a judicial officer subordinate to the appellate Court; and these functions may be delegated not in a plenary fashion but so that control is retained by the appellate Court over the subordinate judicial officer's acts done in his capacity as a delegate of the referee. In this way the decision of the judicial officer may be subject to the control of the appellate Court but not by way of appeal. All these powers must, in my opinion, be brought within or derived from the jurisdiction which the Court acquired by being empowered to adjudicate upon the suit praying that a scheme be framed and the administration of the trust be provided for. In accordance with the distinction that I have last made, we have provided in the amendments that we have decided to make in the scheme, that the District Judge shall have plenary power to appoint trustees, but the power of dismissal has been retained by this Court, and then that power has been partially delegated to the District Judge so as to make his decision subject to confirmation by this Court.

The decision of the Privy Council in 27 Bom L R 872[7] seems to me to furnish authority for the conclusions that I have reached. Though the history of that case is complicated, the relevant facts are few. There was a suit for a scheme instituted in 1880 : 12 Bom 247.[10] An appeal from the decision of the High Court arising out of that suit was dismissed by the Privy Council in 1899 : 24 Bom 50.[11] The scheme as framed came up to the High Court in September 1906, and was confirmed on 14th May 1912, by the Privy Council : 15 Bom L R 13.[12] The scheme contained two provisions under which it could be added or altered :

(1) Under Cl. 12 (7) :

> The Committee shall have power . . . to have all the rules framed by them sanctioned by the District Court of Ahmedabad to the intent that the rules, when sanctioned, shall have the same force as if they were part of the scheme.

(2) Cl. 20 :

> The provisions of this scheme may be altered, modified or added to by an application to His Magisty's Court of judicature at Bombay.

Under Cl. 12 (7) rules were framed by the Committee and sanctioned by the District Judge. The rules therefore had the same force as if they were part of the scheme. In this manner a power to add to the scheme under Cl. 12 (7) was vested jointly in the Committee and the District Judge. Once the power was so exercised, neither the High Court nor any other authority was given by the scheme any power to sit in appeal over what had, with the sanction of the District Judge, been done by the Committee. In this connexion the Privy Council say (p. 875) :

> The sanction given by the District Judge to the rules was apparently considered in the High Court, although erroneously, to be an order made under S. 47, Civil P. C., 1908, and appeals from it were presented to the High Court at Bombay.

The Privy Council also held that there was no appeal to itself from the judgments of the High Court (p. 876) "except on the sole ground that the judgments or decrees were incompetent." But the High Court had entertained appeals purporting to have been filed under S. 47, Civil P. C., 1908, and had by its orders dated 11th April 1919, and 22nd September 1919, varied the rules which the District Judge had sanctioned : *see* 22 Bom L R 232.[13] Under the order of the High Court (secondly mentioned above)—dated 22nd September 1919, the rules were framed in accordance with the view of the High Court. Both these orders were set aside as incompetent by the Privy Council. But their Lordships expressly stated that after the rules framed by the Committee had under Cl. 12 (7) been sanctioned by the District Judge, the scheme (with the duly sanctioned rules incorporated therein) could, under Cl. 20, be altered or modified by the High Court upon an application made to it with the object to alter, modify or add to the scheme. This power had not been exercised by the High Court, but it could still be exercised upon application to it. The decision of the Privy Council was consequently that under the scheme the District Judge had the power to sanction rules framed by the Committee. An appeal from this action was not competent. But the High Court had reserved to itself the power to alter, modify or add to the scheme on an application being made to it. The validity of that power was recognized by the Privy Council. Applying the principles that I have stated to the questions in the present case, I agree with my learned brother that under the scheme the power to remove the trustees was given to the District Judge, and that the District Judge must in that respect be considered to act as *persona designata* as a referee in the administration of the institution, and not as a Court. The clause giving the District Judge power to remove trustees has been construed by us. The power to remove must include the power to suspend. It would follow, as explained by my learned brother, that the District Judge had power to provide for the management of the institution on a dismissal or on a suspension.

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[10] Manohar Ganesh v. Lakhmiram Govindram, (1888) 12 Bom 247.

[11] Chotalal v. Manohar Ganesh, (1899) 24 Bom 50=26 I A 199=2 Bom L R 516 (P C).

[12] Sevok Kirpashankar v. Gopalrao, (1912) 15 Bom L R 13=17 I C 441 (P C).

[13] Asharam v. Dakore Temple Committee, A I R 1920 Bom 153=55 I C 955=44 Bom 150=22 Bom L R 232.

The exercise of that power must take the form in substance of appointing a receiver for the management of the trust and may be exercised in a manner similar to that followed by a Court when it appoints a receiver; but, in my opinion, that power was derived from the scheme and in the exercise of it the District Judge was not acting as a Court. The learned District Judge desired to act as a Court so that his action may be subject to re-consideration by the High Court. He, therefore, purported to appoint a receiver under O. 40, R. 1, Civil P. C., and thought that in this way his order would be subject to appeal to the High Court. It seems to me that from the principles that I have stated, it follows that he was not acting in his judicial capacity under the Civil Procedure Code, and his acts under the powers of dismissing trustees were not and could not by his own volition be made judicial acts, subject to appeal to this Court, as if he had acted as a Court under the Civil Procedure Code. The proceedings did not start before the learned District Judge in the manner in which proceedings for the appointment of a receiver, whether during execution or at a prior stage of the suit, must start. Subsequently the learned Judge with the motive that I have indicated purported to give it a form for the appointment of the receiver under the Civil Procedure Code. It cannot lie with the Judge to clothe a power derived under the scheme with those consequences which follow the exercise of jurisdiction conferred upon a Court by the legislature. The Judge cannot of his own volition say that a particular act shall be considered to be a judicial or an administrative act. He cannot by his own will turn an act of one kind into one of the other so as to allow or preclude an appeal.

For similar reasons I am of opinion that the District Judge had authority to make the enquiries enabling him to exercise his administrative functions under the scheme, and that his decisions were not subject to appeal. I agree with the observations of my learned brother on the construction of the existing clauses of the scheme and on the advisability of altering some of the provisions so as to leave no danger for misunderstandings in future. I agree to the orders referred to in my learned brother's judgment. (The rest of the judgment is not important for purposes of this report.)

W.D./A.L. *Order accordingly.*

✻ A. I. R. 1937 Bombay 135

BROOMFIELD AND WASSOODEW, JJ.

Gurushiddappa Mallappa—Defendant—Appellant.

v.

Parwatewwa Shivappa — Plaintiff — Respondent.

First Appeal No. 279 of 1931, Decided on 16th July 1936, from decision of Addl. First Class, Sub-Judge, Dharwar, in C. S. No. 9 of 1931.

(a) Hindu Law—Maintenance — Widow — Amount of—Stridhan ornaments possessed by widow, how far to be taken into account in determining her amount of maintenance discussed.

Per *Broomfield, J.*—As an ordinary rule stridhan ornaments are not to be taken into account in assessing maintenance to a widow. This rule however is not an invariable rule. If the widow were in possession of ornaments of great value, which she will not ordinarily use or wear and which she is likely to dispose of, the matter will be different. [P 137 C 2]

Per *Wassoodew, J.*—In calculating the amount of maintenance the widow's stridhan must be taken into account unless it is of unproductive character. In calculating it, distinction should be made between productive and unproductive stridhan. Inasmuch as her right to maintenance out of her husband's estate is absolute and it rests upon the possession of her husband's property by the person from whom the maintenance is claimed, in consideration of the circumstances of her position as well as the estimated income of the property sought to be made liable for maintenance, while fixing the amount, it will be proper to take into account the potentiality of the widow's income from stridhan ornaments upon conversion unless the value thereof is insignificant: *4 N W P 63*; *2 B H C 323*; *2 Bom 573 (FB)* & *A I R 1925 Mad 645*, *Ref.* [P 141 C 1, 2]

✲ **(b) Hindu Law—Maintenance—Widow—Amount how determined — Joint Hindu family — Person dying leaving behind him his father and two widows — Father settling part of property on one of them for maintenance—Subsequent adoption of son to himself subject to settlement—Unprovided widow suing adopted son for maintenance—Only property in actual enjoyment of adopted son is to be considered—Property settled before adoption is not to be considered in fixing amount of maintenance.**

The widow of a person who was a member of a joint Hindu family, takes the right of her maintenance in the property as it stands at the time of her husband's death, when such right comes into existence. But where such person dies leaving behind him his father and two widows and the father makes a settlement of part of the property on one of the two widows for her maintenance and subsequently adopts a son to himself subject to such settlement, the other unprovided widow, when she sues for maintenance, cannot claim to be paid her maintenance, by the adopted son, on the basis of the income of the whole estate. The properties already settled upon the widow cannot be included in determining the maintenance, though that property may be liable to contribute towards the maintenance on its reversion to the estate on the death of that widow. The obligation on the adopted son therefore to provide for the maintenance is only with respect to the property which he actually enjoys: *A I R 1918 All 408*, *Rel. on.* [P 137 C 2; P 138 C 1]

(c) Hindu Law — Maintenance — Widow—Pre-deceased son's widow adopting son—Suit by her father-in-law and his adopted son to set aside adoption made by her—Adoption by her and contest of the suit by her do not suggest waiver or abandonment on her part of her right to maintenance.

Where in a joint Hindu family, the predeceased son's widow adopted a son and her father-in-law and his adopted son brought a suit for setting aside the adoption made by her, and the widow contested the suit:

Held: that the widow could not be deemed to have waived or abandoned her right to maintenance, merely on account of adoption made by her and the contesting of the suit by her: *A I R 1929 P C 128*, *Foll.* [P 139 C 1]

(d) Hindu Law—Maintenance—Arrears of—It is in discretion of Court to grant arrears — Arrears of maintenance need not be awarded at same rate as future maintenance—Rate of arrears is discretionary with Court.

The question of granting arrears is a matter of discretion with the Courts. The Courts can grant or withhold the arrears with special reference to the urgent need and necessities of the widow. But the arrears of maintenance need not be awarded at the same rate as future maintenance. The period from which arrears should be allowed and the rate at which it should be allowed are both in the discretion of the Court: *A I R 1918 Bom 122*, *Rel. on*; *A I R 1929 P C 128* and *A I R 1934 Mad 401*, *Ref.* [P 139 C 2]

G. R. Madbhavi—for Appellant.

G. P. Murdeshwar—for Respondent.

Broomfield, J.—The suit from which this appeal arises was brought by the respondent, Parwatewwa, to recover maintenance past and future and ornaments valued at Rs. 4,318. Maintenance was claimed at the rate of Rs. 2,500. The plaintiff's husband, Sivappa, died in June 1926. He left two widows, one Gangawwa and the plaintiff, Parwatewwa. In December 1926, Sivappa's father Mallappa made a settlement deed by which he transferred considerable properties to Gangawwa for her lifetime. Thereafter Mallappa adopted a son, the defendant, and the plaintiff's suit for maintenance was brought against him after Mallappa's death. The adoption of the defendant was expressly made subject to the settlement in favour of Gangawwa.

The trial Court awarded the plaintiff Rs. 1,000 as arrears of maintenance for four years and future maintenance at the rate of Rs. 600 a year. The claim for the ornaments was dismissed on the ground that they were in the plaintiff's possession. In this appeal by the defendant three points have been taken: (1) that the value of the plaintiff's ornaments should be taken into consideration in awarding maintenance; (2) that the rate at which future maintenance has been allowed is excessive and that the trial Court was wrong in taking the income of the whole estate including that part of it which went to Gangawwa under the settlement deed as the basis of calculation; (3) that the plaintiff is not entitled to arrears in view of her conduct. There are cross-objections that the rate of maintenance should be Rs. 650 and not Rs. 600 a year and that the arrears should have been awarded at the same rate, or at any rate at the rate of Rs. 400 a year, i. e., Rs. 1,600 in all, in respect of which court-fees have been paid.

The case involves some rather interesting questions of Hindu law. The first is whether the trial Judge is right in holding that a widow's stridhan ornaments cannot be taken into consideration while determining the quantum of maintenance on the ground that they are unproductive property. Apparently there is no clear authority for such a proposition in the texts. Strange in his Hindu Law published in 1830 treated it as an open question whether in estimating maintenance a woman's stridhan including clothes, ornaments and the like should be taken into account, or only such articles of her property as are productive of income to her or conducive to her subsistence. But he thought the latter view the more reasonable: Strange's Hindu Law, Vol. 1, p. 171. In 4 N W P 63[1] the High Court of the North Western Province held that this is the law (p. 73):

> Nor will the fact, that a widow has in her possion jewels and other property unproductive of income, deprive her of or diminish her right to maintenance if they constitute her stridhan, or although forming part of her husband's estate, they are suitable to the position of the family in society. If, on the other hand, she has property in her possession productive of income, the amount should be taken into consideration in determining the measure of her allowance for maintenance.

It appears from 2 B H C 323,[2] decided in 1866, that at the time there was a course of authority in Bombay to the effect that a woman's 'peculiar property,' i. e., stridhan should not be taken into account in considering a claim to maintenance if she were in need of support. In the monumental discussion of the law of maintenance in Wetsropp, C. J.'s judgment in 2 Bom 573,[3] the particular question whether stridhan should be taken into account or not was left open as it did not arise in that case. In neither of these Bombay cases was any distinction suggested between productive and unproductive stridhan. In a fairly recent Madras case, A I R 1925 Mad 645,[4] Kumaraswami Sastri, J. held that the fact that a widow has got jewels of her own does not affect the quantum of maintenance, which would otherwise be fixed having regard to the extent of her husband's property. In that case the widow belonged to a community in which widows are permitted to wear ornaments, but that was not the basis of the decision. The learned Judge did not refer to 4 N W P 63[1] and no case has been cited before us in which judicial approval has been given to the rule laid down in that case. But the commentators on Hindu law have accepted the rule as settled law: Mayne, 9th Edn., p. 659; Mulla's Principles of Hindu Law, 8th Edn., p. 595; Sarkar's Hindu Law, p. 702; Gour's Hindu Code, 3rd Edn., S. 92. I think it must be taken to be good law that as an ordinary rule stridhan ornaments are not to be taken into account in assessing maintenance. It need not be laid down as an invariable rule. If the widow were in possession of ornaments of great value which she would not ordinarily wear or use, and which she would be likely to dispose of, that might be a different matter. In the present case, I see no reason to differ from the view taken by the trial Judge.

That brings me to the second point, as to the rate at which maintenance must be allowed. The learned trial Judge has estimated the income of the estate chargeable with maintenance as from Rs. 6,000 to Rs. 7,000. He arrives at the figure in this way. In a suit filed by Mallappa and Shivappa in 1928 a statement was put in by the pleader for the plaintiff to the effect that the estate was worth Rupees 1,00,000. Now the value of the immoveable property, land and shops, could not, according to the learned trial Judge, be valued at more than a maximum of Rs. 50,000. Therefore, he inferred, the value of the other main source of income, the money lending business, must be taken to be Rs. 50,000, and the income of that business might reasonably be estimated at Rs. 5,000 a year. To that he added Rs. 1,500 as the total income of all the lands including the lands assigned to Gangawwa for her maintenance. This figure, Rs. 1,500, was arrived at by taking five times the assessment as the net income. Then in addition a net income of Rs. 500 was estimated as the income from the shops including one shop given to Gangawwa.

The learned advocate for the appellant contends, I think rightly, that as the adoption of the defendant was made subject to the settlement deed, the property given to Gangawwa cannot be taken into consideration in estimating the amount of maintenance payable by defendant to the plaintiff. The learned advocate for the respondent in support of the learned trial Judge's view that the income of the whole estate must be taken as the basis relies on a passage in Sir Dinshaw Mulla's

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[1] Shib Dayee v. Doorga Pershad, (1872) 4 N W P 63.

[2] Chandrabhagabai v. Kashinath Vithal, (1866) 2 B H C 323.

[3] Savitribai v. Luximibai, (1878) 2 Bom 573 (F B).

[4] Shyama Bhai v. Purushothamdoss, A I R 1925 Mad 645=90 I C 124=21 M L W 551.

Principles of Hindu Law, 8th Edn., p. 600. The proposition there stated is :

> A Hindu cannot dispose of his entire property by gift or by will so as to defeat the right of his widow to maintenance. If he does so, the donee or devisee must hold the property subject to the widow's right of maintenance, and the widow may enforce her right against it.

I do not desire to throw any doubt on the correctness of that proposition, which indeed is supported by the authorities to which the learned commentator refers. But it affords no support to the trial Judge's view that the defendant, who has inherited an estate diminished by the properties granted to Gangawwa under the settlement, is liable to pay maintenance to the plaintiff on the footing that the estate is undiminished. It may well be that the plaintiff might enforce her right as against Gangawwa, and when on Gangawwa's death the lands granted to her revert to the estate, they will then become liable to contribute to the plaintiff's maintenance. As things are at present, however, the obligation on the defendant to provide for the maintenance of the plaintiff must be limited to the estate which he actually enjoys. It is quite true, as held in 40 All 96,[5] that when a right of maintenance comes into existence in favour of the widow of a man who was a member of a joint Hindu family, she takes that right in the property as it stands at the time of her husband's death. What was decided in that case was that she cannot set up her right of maintenance as against alienations effected during the lifetime of her husband. In the present case the alienation by the deed of settlement was after her husband's death. Possibly, therefore, the plaintiff may be in a position to challenge the alienation. But that is the same point over again. Whether she has the right to challenge the alienation or not, she has no right to compel the defendant to pay her maintenance on the basis of the income of the whole estate. The learned trial Judge, therefore, was wrong in basing the award of maintenance on the income of the whole estate including the properties transferred by the settlement deed. As it happens, however, we do not consider that that makes any material difference.

There are two other points in which the reasoning of the learned trial Judge can hardly be sustained to its full extent. There is obviously no substantial basis for the estimate of Rs. 5,000 as income from the money lending business. Nor would it be correct to take the provision made by Mallappa for the maintenance of Gangawwa as necessarily a fair criterion for the plaintiff's maintenance. Gangawwa was Mallappa's grand-daughter. As recited in the settlement deed, he had special affection for her, and she was looking after him, and because he made a grant to her of properties bringing in an income of Rs. 800, it does not follow that the plaintiff is entitled to an equal amount or to an amount estimated with reference to that. On the other hand, the learned Judge is obviously right when he says that a presumption should be drawn against the defendant in view of his failure to produce satisfactory accounts. The defendant himself has no personal knowledge, and the fact that he did not go into the witness box therefore need not be commented on. But the evidence of the clerk Virbhadrappa, Ex. 23, is most unsatisfactory. He is paid Rs. 400 a year to look after the estate and he says that he has no accounts. It is almost incredible that that should be so, and the witness admits that certain *tippans* were kept, and even those have not been produced. Virbhadrappa evidently made a very bad impression on the Judge in the witness box, and I think that the statements produced by him purporting to show the income of the family must be received with very great caution. Incidentally this witness has admitted that there were two large sums of cash, a deposit amount of Rs. 15,900 and a sum of Rs. 5,000, the insurance on Shivappa's life. The statements produced do not contain these sums at all and the witness alleges that the money was not invested. Seeing that there has been for years past a family money lending business, this statement is practically incredible.

The defendant's own estimate as placed before us by his learned advocate was as follows : Income from money lending Rs. 996; income from shops Rs. 510; income from lands Rs. 550; dividends Rupees 182; total Rs. 2,238. This is excluding the properties granted to Gangawwa. That exclusion, as I say, may properly be made. But the figures are based on the statements produced by the clerk Virbhadrappa which are clearly unreliable. It is admitted that the family has been paying income-tax and papers have been produced showing that income-tax was paid as on an income of about Rs. 2,000. That would be income exclusive of agricultural income. Now the income from money lending may well have been more but can hardly have been less than that on which tax was paid. If, therefore, we were to take Rs. 2,000 as the income from money lending, that would probably be a very conservative estimate. According to the trial Judge's method of calculation, five times the assessment, the income from the lands would be Rs. 875. Adding Rs. 500 for income from the shops we get Rupees 3,375 as the lowest reasonable estimate of the income of the estate actually in the defendant's hands. It may well have been more than that, though I think it is doubtful whether it amounted to the sum found by the learned trial Judge. Even taking the income at this figure of Rupees 3,375, however, the value of the share of plaintiff's husband would be about Rupees 1,600. That is the maximum limit of maintenance which could be awarded. As the sum of Rs. 600 allowed by the trial Judge is obviously well within the maximum, and as the sum of Rs. 50 a month seems to be a reasonable figure, having regard to the circumstances and status of the family, I think there is no reason to alter the award which has been made.

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[5] Ramzan v. Ram Daiya, A I R 1918 All 408= 42 I C 944=40 All 96.

Then as to the arrears, the argument on behalf of the appellant seems to be that the plaintiff had disentitled herself from claiming arrears of maintenance because shortly after her husband's death she adopted a son and for four years she was engaged in litigation with her father-in-law and the defendant who brought a suit to have the adoption set aside. The suggestion that the plaintiff thereby waived or abandoned her right to maintenance is opposed to the principles laid down by the Privy Council in 56 I A 182.[6] On all these grounds, therefore, the appeal fails. Then as to the cross-objections: No satisfactory reasons have been shown for increasing the amount of maintenance from Rs. 600 to Rs. 650 a year. As regards the arrears, Mr. Murdeshwar in support of his contention that the rate at which arrears are allowed should be the same as the rate of future maintenance has relied on the Privy Council case to which I have just referred: 56 I A 182[6] and 57 Mad 1003.[7] Both these cases were concerned mainly with the question from what period arrears of maintenance should be allowed. The Privy Council held that a Hindu widow who left the residence of her deceased husband, not for unchaste purposes, and resides with her father, is entitled to maintenance and to arrears of maintenance from the date of her leaving her husband's residence, although she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence. In 57 Mad 1003[7] it was held, following the Privy Council case, that the Court has no discretion, irrespective of proof of circumstances which might prove abandonment, waiver or estoppel, to limit the period for which arrears of maintenance could be awarded. In both cases there is a discussion of the considerations that should guide the Courts in fixing the rate of the maintenance to be awarded, but in neither is it laid down that as an invariable rule the rate of maintenance must be the same throughout.

In 43 Bom 66[8] it was held that in dealing with claims for arrears of maintenance the Courts have a large discretion to grant or withhold those arrears with special reference to the urgent need and necessities of the widow. A similar view of the law has been taken by the Allahabad High Court in 21 All 183.[9] It appears from Beaman, J.'s judgment in 43 Bom 66[8] that the Court then took the view that there is a discretion both as to the period from which arrears should be allowed and as to the rate at which it should be allowed. In the former respect it may be that this judgment is inconsistent with the recent judgment of the Privy Council. In the latter respect I am not satisfied that it is. As their Lordships observed at p. 186 of the judgment in 56 I A 182[6]:

> Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants and class of life of the parties.

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[6] Ekradeshwari Bahuasin v. Homeshwar Singh, A I R 1929 P C 128=116 I C 409=56 I A 182 =8 Pat 840 (P C).

[7] Sobhanadramma v. Narasimhaswami, A I R 1934 Mad 401=150 I C 797=57 Mad 1003= 67 M L J 712.

[8] Karbasappa v. Kallava, A I R 1918 Bom 122 =47 I C 623=43 Bom 66=20 Bom L R 823.

[9] Raghubans Kunwar v. Bhagwant Kunwar, (1899) 21 All 183=1899 A W N 22.

The matters to be taken into consideration are thus classified by Sir Dinshaw Mulla in his Principles of Hindu Law, Edn. 8, p. 595, with reference to Indian authorities on the subject : (1) the value of the estate, (2) the position and status of the deceased husband and of the widow, (3) the reasonable wants of the widow including not only the ordinary expenses of living but what she might reasonably expend for religious and other duties incident to her station in life. The fact that the plaintiff for the four years before she brought the suit was living with her own relations and not in need of the full amount of maintenance is one of the factors which may be taken into consideration. As explained in the earlier part of this judgment, if she has property of her own, which produces an income, that also is to be taken into consideration, and the amount of maintenance to be awarded out of her husband's estate is to be reduced *pro tanto*. There is nothing illegal or unreasonable in the award of Rs. 1,000 only for arrears. For these reasons the cross-objections must also be dismissed. The appeal and the cross-objections are both dismissed with costs.

Wassoodew, J.—It has been conceded before us that the plaintiff Parwatawwa is entitled to be maintained out of the estate of her husband in the hands of the appellant-defendant who was adopted by her husband's father Mallappa after her husband's death. The main controversy in this appeal is centred round the questions whether the stridhan in the possession of the plaintiff should be taken into account in fixing the rate of her maintenance, whether she is entitled to the arrears of maintenance, and if so, whether those arrears should be awarded at the same rate as future maintenance.

Before dealing with the above questions I shall deal with the evidence of the actual income of the property in the hands of the defendant which is primarily liable for the plaintiff's maintenance. I agree with my learned brother that that income is under-estimated by the defendant's clerk. It has been maintained that upon the income-tax return the total annual net income of the defendant could not exceed Rs. 3,000 inclusive of the income from agricultural sources. The plaintiff has, however, contended for an income double that figure or nearly so. The clerk, who was put forward to support the defendant's case, has demonstrably suppressed at least one large source of income from pledges of ornaments. It was natural to expect in the circumstances that the defendant who was in possession of the property should put before the Court all the material available to arrive at a just and fair conclusion as regards his approximate income. This he has failed to do, and consequently it cannot be said that the calculation made by the lower Court upon the probabilities of the case is unreasonable. Even upon the estimate of the defendant the amount awarded to the plaintiff is well within the maximum. In fixing the rate of maintenance at Rs. 600 per year the lower Court was not traversing on dubious ground. The plaintiff's father-in-law Mallappa in providing for the wants of the plaintiff's co-widow Gangawwa, who also happened to be his grand-daughter, has given her property sufficient to yield, according to the very reasonable estimate of the lower Court, not less than Rs. 800.

It was pointed out that the lower Court erred in taking into account the income of the property of Gangawwa when estimating the total yield of the family income liable for the plaintiff's maintenance. If it were necessary to decide whether Gangawwa's income should be excluded from calculation I should think it inequitable to add that income to the income of the defendant for the basis of calculation. It is essential to remember that the right claimed by the plaintiff was against the property in the hands of the defendant. Gangawwa was not a party to the suit and no claim was made against her. Undoubtedly a Hindu widow whilst debarred from impeaching alienations of the joint family property made in her husband's lifetime, takes the right in the property as it stands at the time of her husband's death. But in all suits to enforce that right the question arises as to the extent to which it could be enforced against the defendant. The Court would naturally look to the nature and extent of the family property which the defendant possesses and would fix the rate by reference to it and not other property which the defendant had no hand in alienating subsequent to the husband's death. The right to proceed against that property may still survive and might be enforced under circumstances to which it is unnecessary to refer : *see Ramzan* v. *Ram Daiya.*[5]

It was, therefore, unreasonable to take the income of Gangawwa's property into account as the lower Court has done in fixing the rate. But even if that income were excluded, I still agree in holding that the income of the other property is large enough to bear the reasonable liability imposed by the lower Court upon it for the plaintiff's maintenance.

Turning then to the main question of law urged in this appeal, it is necessary to state that the case law cited on the point has not yielded any definite principle. There is authority in the text books for the statement that in calculating the amount of maintenance the widow's stridhan must be taken into account unless it is of an unproductive character, such as clothes and jewels. Those examples have led to controversy. The statement is made in Mayne's Treatise on Hindu Law and Usage, Edn. 9, at p. 659. Among the authorities quoted is Strange's Hindu Law, Vol. 1, p, 171, and Vol. 2, p. 307. In the former no definite opinion seems to have been expressed as to whether the productivity of a widow's stridhan should be the condition precedent to its being taken into account in fixing her maintenance. The learned author in the latter volume in regard to certain prevailing practice expresses his opinion as follows :

> . . . I do not understand either the authority or the reason for restricting the maintenance to the amount of half a share, in case of the existence of stridhan. The division (as it appears to me) should be made without reference to any property she may hold under this title, unless it may have been accepted by her, with consent of the parties concerned, in lieu of other claims; and in this case it is evident she is entitled to no further share in the event of division.

In his Principles of Hindu Law, Edn. 7, at p.588, Sir Dinshaw Mulla was perhaps referring to the remarks made by Mayne that unproductive stridhan should be excluded from computation. At the same time he has remarked that there is a conflict of opinion whether a widow is entitled to maintenance out of the property of the joint family to which her husband belonged when the income from her stridhan is sufficient for her maintenance. No qualification is introduced in regard to that stridhan. As far as the current of authority goes, it is in favour of the view that a difference should be made between productive stridhan and unproductive stridhan in calculating the amount of the widow's maintenance : *see* 4 N W P 63,[1] 2 B H C 323[2] and A I R 1925 Mad 645.[4] We were also referred to the cases in 2 Bom 573[3] and 14 Bom 490.[10] The last two cases do not expressly say whether in all conditions and circumstances unproductive stridhan should be excluded and no distinction was drawn between jewels and ornaments placing the former alone in the category of unproductive stridhan. It seems to me difficult upon principle to say that the clothes and jewels or ornaments of the widow, whatever their value, should invariably be excluded in the calculation of her maintenance out of her husband's property. Her right to claim maintenance out of the husband's estate is indeed absolute and rests upon the possession of her husband's property by the person from whom the maintenance is claimed. As I have stated that right is subject to her private means whether actual or potential. Speaking entirely for myself, it seems illogical that in the consideration of the circumstances of her position as well as the estimated income of the property sought to be made liable for her maintenance, the potentiality of the widow's income from stridhan ornaments upon conversion should not be taken into account in fixing the amount of her maintenance. In the present case, however, as compared with the income of the property available, the value of the ornaments of the widow is not very considerable, and it is not clear upon the record, having regard to the custom of the community to which the widow belongs, that the ornaments in her possession would not all be required to maintain the status of her family. Therefore, in the present case the value of those ornaments was rightly excluded in fixing the amount.

With regard to the claim to arrears of maintenance, it is well settled that the question of granting arrears is a matter of discretion. Upon the authorities referred to by my learned brother, arrears of maintenance must be refused if there was evidence of waiver or abandonment or any other justifying cause such as unchastity and the like. But the contention that arrears of maintenance could be awarded upon the same basis as future maintenance cannot be supported either upon authority or principle. In that connexion I would refer to 43 Bom 66,[8] which might be regarded as an authority in this Presidency for the proposition that arrears of maintenance need not be awarded at the same rate as future maintenance. There is nothing in the observations of their Lordships of the Judicial Committee in 56 I A 182[6] to show that there must always be uniformity in the rate of future maintenance and arrears of maintenance. The fact that the amount of maintenance, whether it is fixed by a decree or by agreement, is liable to be increased or diminished, whenever there is a change of circumstances, must reduce the force of the argument advanced by the learned advocate for the respondent in support of his cross-objections that the Court has for all purposes no discretion in reducing the rate at which maintenance is fixed. It seems to me that the learned trial Judge has exercised a wise judicial discretion in fixing the amount of arrears of maintenance as well as the rate of future maintenance. I am satisfied that no case has been made out either for increasing or reducing the same. I, therefore, agree with my learned brother that the decree should be maintained and the appeal and the cross-objections dismissed with costs.

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[10] Gokibai v. Laxmidas Khimji, (1890) 14 Bom 490.

Per Curiam.—For the reasons given in 26 Bom 707,[11] the decree is modified by inserting a provision giving liberty to either party, plaintiff or defendant, to apply in execution proceedings for increase or reduction of the amount of maintenance in case of change of circumstances.

W.D./A.L. *Order accordingly.*

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[11] Maharana Shri Ranmalsangji v. Bai Shri Kundankunwar, (1902) 26 Bom 707=4 Bom L R 531.

✲ A. I. R. 1937 Bombay 142

WASSOODEW, J.

Hari Bapuji Patankar—Appellant.

v.

Bhagu Sadhu Birje and *another* — Respondents 1 and 2.

Second Appeal No. 500 of 1934, Decided on 31st July 1936, from decision of Dist. Judge, Ratnagiri, in Appeal No. 251 of 1932.

(a) Transfer of Property Act (1882), Ss. 54 and 55 (6) (b)—Contract of sale, though by itself does not create charge, does not destroy equities of parties to contract—In case of non-delivery of property buyer is entitled to charge over property for purchase money pre-paid by him under contract of purchase.

Section 55 (6) (b) undoubtedly gives the buyer a charge over the property which he has contracted to buy for the price pre-paid. There is no question of ownership involved in the assertion of that charge, for the ownership in the property would still be in the seller until the execution of the conveyance under S. 54, T. P. Act, which in effect provides that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property. But at the same time it does not destroy effectively the equities of parties to the contract. It is not correct to say that the equities under that section enure for the benefit of a buyer under a completed contract of sale upon execution of the conveyance and delivery of possession, for, if the conveyance were executed, the clause would have no application : *A I R 1928 P C 77, Rel. on.* [P 143 C 1, 2]

✲ (b) Transfer of Property Act (1882), S. 55 (6) (b) — Charge of buyer on property for pre-paid purchase money can be enforced even though person claiming through seller had no notice of charge.

When the legislature effects a change of language by the omission of words which occurred in a statute and those words were necessary to convey a particular sense, the omission must be construed as intended to convey a different sense. The omission of the words 'notice of payment' in S. 55 (6) (b) makes the charge of the buyer for price pre-paid effective not only against the seller but against all persons claiming under him irrespective of notice. Therefore if buyer has a statutory charge against the property purchased by third person, he can enforce it against that property and the plea of want of notice on third person's part would be of no avail. [P 143 C 2; P 144 C 1]

G. B. Chitale—for Appellant.

T. N. Walawalkar—for Respondent 2.

Judgment.—The appellant Hari Bapuji Patankar agreed on 2nd March 1927, to purchase some fields situate at Mouje Zadgaon in the town of Ratnagiri from one Bhagu, wife of Sadu, for a sum of Rs. 700 out of which Rs. 650 were paid to the seller at the date of the contract. The conveyance was not executed, and possession was not delivered by Bhagu. That forced Hari (the appellant) to file a suit for specific performance which he did on 18th March 1930. In that suit a decree was passed on 27th October 1930 as follows :

> Defendant (Bhagu) do pay to the plaintiff the sum of Rs. 650 and the costs of the suit in April 1931. The decretal amount is to be a charge on the property (which had been) agreed to be sold.

Before that decree, Siraj Murtuja, the respondent in this appeal, had obtained a decree for money on 13th November 1925 against the seller Bhagu. He filed execution proceedings in 1930 (Darkhast No. 243 of 1930), and obtained attachment of the property, the subject matter of the agreement for sale on 26th October 1930, that is, one day before the decree in favour of the appellant Hari. The attached property was sold and purchased by Siraj on 9th March 1932, for Rs. 825. After setting off his claim under the money decree, Siraj deposited the balance of Rs. 398-11-0 into Court. On 11th April 1932, Hari filed execution proceedings against the judgment-debtor Bhagu as well as against Siraj Murtuja to recover Rs. 650 with interest and costs awarded to him under his decree. That claim was met by Siraj by the plea that he was a purchaser through Court without notice of the decree passed in Hari's favour, and that his attachment was prior to that decree. That contention has been upheld by the Courts below, and Hari has filed this appeal. There can be no doubt that the rights of Hari as against the vendor Bhagu are governed by the provisions of S. 55 (6) (b), T. P. Act. According to those provisions :

> The buyer is entitled. . . . unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; . . . .

That undoubtedly gives the buyer a charge over the property which he has contracted to buy for the price pre-paid. There is no question of ownership involved in the assertion of that charge, for the ownership in the property would still be in the seller until the execution of the conveyance under S. 54, T. P. Act, which in effect provides that a contract for the sale of immoveable property does not, of itself, create any interest in or charge on such property. But at the same time it does not destroy effectively the equities of the parties to the contract. Those equities are mentioned in S. 55, Cl. (6), sub-cls. (a) and (b). It has been urged that the equities under that section enure for the benefit of a buyer under a completed contract of sale upon execution of the conveyance and delivery of possession. That suggestion is obviously untenable upon the plain language of the clause, for if the conveyance were executed, the clause would have no application. If authority were needed, I would refer to 30 Bom L R 290.[1] The benefit which a buyer gets under Cl. (6) (b) of S. 55 under an executory contract of sale is a charge on the property for the amount of his purchase money.

The question is whether that charge is subject to the provisions of S. 100, T. P. Act, and is operative against persons claiming under the seller irrespective of notice. The provisions of S. 100 include in the definition of 'charge' the charge created by operation of law, and as the buyer's charge is a statutory charge under S. 55 (6) (b) for purchase money paid in advance, its enforcement will be governed by those provisions as well as the provisions of S. 55 (6) (b). The important proviso to S. 100 on which the lower appellate Court has relied is as follows :

> Save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

The question is whether there is any express provision of law for the time being in force dispensing with notice of the charge in the case of a buyer who has paid the purchase money in advance. That Siraj Murtuja is a transferee for consideration cannot be denied, and it is clear from the record that he was not a party to the proceedings in the suit for specific performance. No notice, therefore, can be imputed to him either direct or constructive. He is, therefore, a purchaser for consideration without notice of the charge in favour of Hari, the appellant. It is, however, important to note that by the Amending Act 20 of 1929 the words "with notice of the payment" in S. 55 (6) (b), T. P. Act, have been omitted, and words in regard to notice in Cl. (4) (b) of S. 55 were expressly inserted. The omission, therefore, was deliberate and intended to make a change in the law as regards the buyer's charge for purchase money paid in anticipation of the conveyance. When the legislature effects a change of language by the omission of words which occurred in a statute, and

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1. Sime Darby & Co. v. Official Assignee, A I R 1928 P C 77=107 I C 233=30 Bom L R 290. (P C).

those words were necessary to convey a particular sense, the omission must be construed as intended to convey a different sense. As Sir Dinshaw Mulla has pointed out in his treatise on the Transfer of Property Act, Edn. 2, at p. 285, that omission

> makes the charge of the buyer for price pre-paid effective not only against the seller but against all persons claiming under him irrespective of notice.

Therefore, if Hari had a statutory charge against the property purchased by Siraj, he could enforce it against that property, and the plea of want of notice would be of no avail. The lower Courts were in error in holding that the absence of notice of the charge was a complete answer to Hari's claim. I would, therefore, allow the appeal, reverse the orders of the lower Courts, and direct that the claim in the Darkhast shall be allowed with costs throughout.

B.D./D.S. *Appeal allowed.*

A. I. R. 1937 Bombay 144

BEAUMONT, C. J. AND RANGNEKAR, J.

Hussein Mahomedbhai Khoja — Appellant.

v.

Official Assignee, Bombay — Respondent.

O. C. J. Appeal No. 29 of 1936, Decided on 9th September 1936.

Insolvency — Suspension of discharge — Refusal of protection order during suspension—Not sufficient ground for Court to send insolvent to jail on creditor's application.

Where the Court orders suspension of discharge for a couple of years and refuses to grant protection order to the insolvent during the first year, the mere refusal of the protection order is not sufficient reason for the Court to send the insolvent to prison if an application is made by the creditor in that behalf : *A I R 1929 Cal 144, Ref.* [P 144 C 2]

Jamshed Kanga — for Appellant.

F. J. Coltman — for Proving Creditor.

Beaumont, C. J.—This is an appeal against an order made by Kania, J. in insolvency. It appears from the Official Assignee's report, the correctness of which is not disputed, that the facts in sub-ss. (a), (d) and (f), S. 39 of Presidency-towns Insolvency Act, exists in this case. Therefore, the learned Judge had discretion to suspend the discharge of the insolvent, and to grant or not to grant protection. The learned Judge suspended the discharge for two years and refused to grant a protection order in respect of the first year. The debts of the insolvent had all been incurred for gambling purposes, it is said, from professional money lenders. It is quite clear, in my opinion, that the learned Judge had discretion to make the order which he did make, and I can see no principle on which we should interfere with the discretion which the learned Judge exercised in the matter. It is said that it is very hard to refuse a protection order for the first year; and that the result may be that the insolvent will be sent to prison. But it does not follow that, because a protection order is refused, the Court will commit the insolvent to prison, if an application is made to it in that behalf. I quite agree with the observation of Sir George Rankin in 48 C L J 531,[1] that it is illogical for a debtor to be sent to jail on the application of a single creditor, when the debtor's assets have been impounded for the benefit of the creditors generally.

That is a matter, however, which the Court will consider, if and when an application is made to send the insolvent to jail. As I have said, the mere fact that a protection order has been refused, is not a sufficient reason for the Court to accede to the request of the creditor that the insolvent should be sent to jail. The appeal must be dismissed with costs. Costs of the proving creditor, who has appeared, ought to be paid out of any balance of Rs. 500 deposited in Court remaining after the Official Assignee's costs have been paid.

Rangnekar, J.—I agree.

B.D./A.L. *Appeal dismissed.*

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[1] Nagoremull Modi v. Lachmi Narain Gupta, A I R 1929 Cal 144=113 I C 854=48 C L J 531.

* A. I. R. 1937 Bombay 145

BEAUMONT, C. J. AND RANGNEKAR, J.

Secretary of State — Appellant.

v.

Bank of India, Ltd. — Respondents.

O. C. J. Appeal No. 14 of 1936, Decided on 10th September 1936.

*** (a) Securities Act (1920), Ss. 12 and 21—Scope—Common law rule of indemnity is not consistent with provisions of Act—*B* bank offering to Securities Department, Government pronote for renewal—Officer-in-charge issuing fresh note in favour of *B* — Note transpired to be forged by *A* and belonging to one *G*—*G* suing Secretary of State for value of note and obtaining decree — Latter suing *B* for being indemnified for loss sustained by him by issue of fresh pronote on *B's* request — Secretary of State held not entitled to be indemnified by *B* bank.**

It is a general principle of law that when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. [P 146 C 2]

Once a request is made to another and he acts upon such request it is immaterial whether such another has or has not power to look into the matter himself. This Common Law doctrine of implied indemnity cannot be taken shelter of when the parties to contract have made provision to the contrary. [P 147 C 2; P 148 C 1]

Thus where *B*, the Bank of India, offered to the Securities Department a certain Government promissory note with a request for its renewal and the Department issued a fresh promissory note in favour of the Bank believing that the Bank had a valid title to the note, but later on it transpired that the note belonged to one *G* whose signature was forged by *A* who endorsed it to the Bank and *G* then sued the Secretary of State for the value of the note and obtained judgment, whereupon the Secretary of State sued the Bank for being indemnified for the loss he sustained on account of the renewal of the note on their request :

Held : that the Indian Securities Act formed a complete Code providing for the renewal of the Government promissory notes. It solely lay with the officer appointed in that behalf whether to grant or refuse renewal or grant it on taking indemnity from the person making request. It was not intended to require indemnity in all cases as could be seen from Ss. 12 and 21 of the Act. The authority to decide in what cases indemnity was necessary was given to the officer-in-charge. The Common Law rule of implied indemnity could not be read into the Act merely because there was a request for renewal by the Bank to the officer-in-charge and he acted upon it. The Bank was not therefore bound to indemnify the Secretary of State for the loss sustained by him : *Sheffield Corporation* v. *Barclay*, *(1905) A C 392* and *Dugdale* v. *Lovering*, *(1875) 10 C P 196, Rel. on.* [P 147 C 2; P 148 C 1]

*** (b) Securities Act (1920), S. 16 (1)—Scope—Renewed Government pronote for old one is one issued for consideration—Renewed note constitutes new contract between Government and person to whom it is issued—Secretary of State is not entitled to return of renewed note on being required to reimburse person to whom old note really belongs — Return of renewed note is inconsistent with S. 16 (1) and with provisions of Act.**

Where the Securities Department issue a fresh promissory note in lieu of an old one, the renewal of the note is for consideration inasmuch as the Government gets the old promissory note for what it is worth. The renewed note constitutes a new contract, not a contract which is void or voidable but a valid contract between Government and the person to whom it is issued. The return of the renewed note, a note which is for consideration and which is basis of the contract is inconsistent with S. 16 (1) of the Act and also with the plain terms of the Act. [P 148 C 2]

The Secretary of State is not therefore entitled to return of the renewed promissory note from the person to whom it is issued merely because the Secretary of State was required to re-imburse the person to whom really the old note belonged. [P 148 C 2]

K. McI. Kemp — for Appellant.

F. J. Coltman and *M. C. Setalvad* — for Respondents.

Beaumont, C. J.—This is an appeal from a decision of B. J. Wadia, J. which raises a question of considerable importance to banks and not, I think, altogether free from difficulty. The facts are not in dispute. A lady called Gangabai was entitled by endorsement to a Government promissory note which she had acquired through a broker named Acharya. Subsequently Acharya obtained possession of the note from Bai Gangabai and he forged her endorsement on the note to himself. Subsequently he endorsed the note over to the defendants, the Bank of India, Ltd. The Bank sent the note, with other notes, to the Government Securities Department with a request for its renewal, and the note was in due course renewed by the prescribed officer of the Government Securities Department. When it was ultimately established that the signature of Bai Gangabai on the note had been forged by Acharya, Bai Gangabai sued the Secretary of State for the value of the note, and she recovered judgment for the amount due on the note with interest and costs.

In this suit the Secretary of State sues the Bank of India, Ltd., and claims that the Bank is liable to indemnify him against the loss which he incurred by acting on the request of the Bank for the renewal of the note. Alternatively he claims that the renewed note or the value thereof may be returned to him on the basis that it was issued without consideration, or under a mistake of fact. The principle of law on which the Secretary of State relies is not disputed. There are many cases on the subject, but it will be sufficient to refer to the well known case in (1905) A C 392.[1] In that case stock of the Sheffield Corporation had been transferred to Barclays by a transfer which was ultimately found to have been forged in respect of the signature of one of the transferors, so that in fact the transfer was invalid. Barclays sent the transfer to the Registrar of the Sheffield Corporation and requested him to register them as transferees, and that request was complied with. Subsequently the Corporation had to make good the loss to the proper holders of the stock and they sued Barclays on their implied indemnity. Both Lord Halsbury and Lord Davey, who gave the only two reasoned judgments, point out that in registering the transfer the Sheffield Corporation were performing a merely ministerial act. They had power under their special Act to require evidence of the title of the person claiming the right to make a transfer; but once the validity of the transfer was established, the Corporation had no power to do anything but to register it. If the Corporation had required evidence of the title of the transferee and had refused to register, they could have been compelled to register if a Court of competent jurisdiction was satisfied that in fact the transfer was valid. So that, once you have a valid transfer, the act of the Corporation in registering is merely ministerial. Lord Davey in stating the general proposition of law confines that proposition to the case of somebody exercising a statutory or Common law duty. The form in which he states the proposition is this. He says (p. 399):

> I am further of opinion that where a person invested with a statutory or Common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it.

On the other hand, Lord Halsbury adopts the proposition of law laid down in 10 C P 196[2] in the terms of counsel's argument in that case, which is expressed in more general terms. That proposition is in these terms (p. 397):

> It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.

That proposition seems to be independent of the question whether the person who acts upon the request was bound to do so or not; and in dealing with this case I will assume—as I think I must do—that the proposition expressed in the wider terms represents the Common law. The question, then, is whether that proposition of law applies to the facts of this case; and that must depend on a consideration of the Securities Act of 1920, under which this promissory note was renewed. It is, in my opinion, clear from a perusal of the Act as a whole that one of the principal objects of the Act was to simplify dealings in Government securities; and the right to renew is, I think, part of the general policy of simplifying dealings in securities and thereby making investment in Government Securities more popular. The difficulty, which I apprehend was felt, was that where a promissory note had many endorsements upon it, persons were unwilling to deal with it because of the risk that an endorsement might have been forged, and it was to get over that difficulty that provision for renewal of the note and the giving of a fresh and clean contract to the holder was made. The material sections for the purposes of this case are, first of all, S. 12, which provides that:

> Subject to the provisions of S. 13, a person claiming to be entitled to a Government promissory note, may, on applying to the prescribed officer, and on satisfying him of the justice of his claim and delivering the promissory note receipted in the prescribed manner, and paying the prescribed fee, if any, obtain from such officer a renewed promissory note payable to him.

Section 13 deals with the case in which there is a dispute as to the title to a

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[1] Sheffield Corporation v. Barclay, (1905) A C 392=74 L J K B 747=93 L T 83=54 W R 49=12 Manson 248=69 J P 385=10 Com Cas 287=3 L G R 992=21 T L R 642.

[2] Dugdale v. Lovering, (1875) 10 C P 196=44 L J C P 197=32 L T 155=23 W R 391.

Government promissory note in respect of which an application for renewal has been made, and the section lays down the course to be adopted by the prescribed officer in that event. Then S. 15 contains certain provisions for conversion, consolidation or sub-division of Government securities. Then S. 16 is an important section in connexion with the general policy of Government in relation to the renewed notes and provides that:

> (1) When a renewed Government promissory note has been issued under S. 12, or a new Government promissory note has been issued upon conversion, consolidation or sub-division under S. 15, in favour of any person, the note so issued shall be deemed to constitute a new contract between the Government and such person and all persons deriving title thereafter through him. (2) No such renewal, conversion, consolidation or sub-division shall affect the rights as against the Government of any other person to the security or securities so renewed, converted, consolidated or sub-divided.

It seems to me clear from that section that when a new note is issued, it constitutes a fresh contract between Government and the person to whom it is issued, and is free from any infirmities of the old note. The only other section, which it is necessary to refer to, is S. 21, which provides that:

> Notwithstanding anything in Ss. 10 (which deals with lost notes), 12, 13 or 15, the prescribed officer may in any case arising under any of those sections (i) issue a duplicate or renewed security or convert, consolidate or sub-divide a security or securities upon the applicant giving the prescribed indemnity against the claims of all persons claiming under the original security or under the security or securities so renewed, converted, consolidated or sub-divided, as the case may be, or, (ii) refuse to issue a duplicate or renewed security or to convert, consolidate or sub-divide a security or securities unless such indemnity is given.

Now, the first point taken by the respondents in answer to the appellant's claim, that this implied right of indemnity exists, and the point, which appealed to the learned Judge in the Court below, is this. It is said that the prescribed officer acting under S. 12 is not like the corporation in the *Sheffield Corporation case*[1] performing a merely ministerial duty. Under S. 12, a person claiming to be entitled to a Government promissory note is only entitled to renewal, amongst other things, on satisfying the prescribed officer of the justice of his claim, which means—I take it—satisfying the prescribed officer that he is in fact entitled to the Government promissory note. The prescribed officer, therefore, is entitled to require evidence which satisfies him—not merely evidence which might prove to a Court of law that the title to the note was valid but which satisfies the officer— and it is, I think, true to say that the officer cannot be regarded as exercising a merely ministerial duty. Assuming that he acts honestly and brings his judgment to bear on the case and does not act merely capriciously, I take it that if he says that he is not satisfied of the justice of the claim, no Court could compel him to issue a renewed note. To that extent his position is undoubtedly different from that of a corporation or company required to register a transfer, because in such a case the corporation or company could be required to register the transfer on proof that it was a valid transfer. But I am not myself satisfied that that distinction, which exists between this case and the *Sheffield Corporation case*[1] is a vital distinction. Taking the rule of law as enunciated by Lord Halsbury, it seems to me that once you have a case in which a request is made to the prescribed officer to renew, and that request is in fact acted upon, then, apart from other considerations, the covenant of indemnity, which the Common law implies would arise notwithstanding that the prescribed officer had looked into the matter himself or, at any rate, had power to look into the matter himself. If he acts upon the request, I doubt if it is really relevant to say that he has also considered the matter for himself. I am not, therefore, prepared to agree with the ground on which the learned Judge in the Court below based his judgment on this part of the case. But that is not the only point in the case.

We have to consider whether this covenant of indemnity which the Common law normally implies, where one person acts upon the request of another, can be implied in the facts of this case. The Indian Securities Act I think, forms a complete code as to the circumstances in which Government Securities can be renewed. Apart from the Act, there is plainly no right of renewal, and the scheme of the Act seems to me to be this. When a request for renewal is made under S. 12, the prescribed officer can consider whether the claim of the person making the request to the note is a valid claim. If he comes to the conclusion that it is, he can renew the note. If he comes to the conclusion that it is not, he can either refuse renewal or under S. 21 (1), can renew the note on obtaining an indemnity in the prescribed form from the claimant; and where the claimant is, as here, a bank whose solvency is unimpeachable, he might well be willing to act upon an indemnity. If, again, he comes to the conclusion that he is satisfied of the title of the claimant, but at the same time is not comfortable about the note in question, he may then, under sub-s. (2), S. 21, decline to grant a renewal except on the terms of an indemnity.

Now, it is perfectly clear from the combined provisions of S. 12 and S. 21 that the legislature, when they passed this Act, had in view the question of requiring an indemnity when a note was renewed; and if they had intended that in all cases an indemnity should be given, it would have been very easy so to provide under S. 12. Had they done so, the effect might have been to curtail the beneficial operation of the Act by making renewals unpopular; and it seems to me impossible to hold that the legislature omitted to require an indemnity in all cases otherwise than deliberately. Instead of requiring an indemnity in all cases, power is given to the prescribed officer to demand an indemnity, leaving it to Government, by directions to their officer, to determine in what cases an indemnity shall be required. If we read into the Act the indemnity which the Common law normally implies, from the mere fact that a request is made and acted upon, it seems to me that we shall be in effect inserting in the Act a provision which, as the terms of the Act satisfy me, the Legislature deliberately omitted. The Common law rule as to implied indemnity being a rule which affects obligations of a contractual nature between parties must clearly yield to the expression of any contrary intention, and it must always be open to the Court to hold that the dealings between the parties are inconsistent with the implication of the covenant in question; and, in my opinion, taking this Act as a whole, the implication of the suggested covenant of indemnity is inconsistent with the provisions which the Legislature has laid down as to the renewal of a promissory note. In my opinion, therefore, the judgment on the first part of the plaintiff's claim is right, though I do not entirely agree with the reasons which the learned Judge gave in his judgment.

With regard to the alternative claim, namely, that the Secretary of State is entitled to the return of the renewed note on the ground, first, that it was issued without consideration, it seems to me that the short answer to that is that Government got precisely the consideration which they required. They issued the renewed note in return for the old note accompanied by the prescribed receipt; and if I am right in thinking that the Government officer had the right to satisfy himself as to whether the note was valid or not and as to whether he would require an indemnity, it is clear that there was no failure of consideration. Government got the old note for what it was worth. Therefore, in my opinion, that claim must fail. With regard to the suggestion that Government are entitled to the return of the renewed note, or its value, because admittedly it has been negotiated by the bank, it seems to me that the answer to that is, first of all, that there is no direct evidence of any mistake, though no doubt it would not be difficult to infer that Government imagined that the note they were renewing was a valid note. But, apart from that, the claim to return of the renewed note, is, it seems to me, clearly inconsistent with the provision of S. 16 (1). The renewed note is to constitute a new contract—not a contract which is void or voidable, but a valid contract—between Government and the person to whom the note is issued, and to say that the person to whom the note is issued is bound to return it on the basis that it is not a good contract, seems to me inconsistent with the plain terms of the Act. In my opinion, therefore, the alternative claim of the Secretary of State must also be rejected. In the result, the appeal fails and must be dismissed with costs.

Rangnekar, J.—I agree and I have nothing to add.

W.D./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 148

BEAUMONT, C. J. AND MACKLIN, J.

Bai Dhankor—Accused—Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 368 of 1936, Decided on 23rd November 1936, from decision of Sess. Judge, Surat.

Criminal Trial—Sentence—Reduction of—Appeal — Procedure to be followed by High Court where conviction is right but sentence is severe.

Where an appeal is filed against a conviction and sentence and the High Court thinks that the conviction is right on merits but the sentence is rather too severe, the correct procedure in such cases is that when the appeal first comes on for hearing, it should not be dismissed summarily, but should be directed to stand over, and at the same time notice should be served on Government under the revisional powers conferred upon the High Court by S. 439, Cr. P.C. to show cause why the sentence should not be reduced. At the same time it will be convenient to send for the record. The notice and the appeal will then be heard on the same day. If, after hearing the Government Pleader, the Court comes to the conclusion that the sentence ought to be reduced, it can be reduced under the revisional powers. Having reduced the sentence the High Court can then, if it sees no ground for interfering with the conviction or sentence, dismiss the appeal summarily under S. 421, Criminal P. C.: *A I R 1935 P C 89, Expl.* [P 149 C 2]

P. B. Shingne—for the Crown.

Beaumont, C. J. — This appeal came before the Court as an appeal from jail. On perusing the judgment we thought that the conviction was clearly right on the merits, but that there was ground for thinking that the sentence was rather too severe. It was formerly the practice of this Court, in such cases, to mark the appeal as admitted, as to sentence, which meant in effect that the appeal was dismissed on the merits but notice issued to the Crown to show cause why the sentence should not be reduced. That practice seems to have prevailed in the High Court of Calcutta with this variation : that that Court did not always give notice to the Crown. In a recent case, 37 Bom L R 557,[1] which was an appeal from the High Court of Calcutta, this practice was challenged before the Privy Council, and the Privy Council held that the practice was not in accordance with the Code; that the High Court can dismiss the appeal summarily under S. 421, Criminal P. C., if it sees no sufficient ground for interfering ; but unless it adopts that course the Court is bound to issue notices under the succeeding sections ; and that where the appeal is against both the conviction and sentence the appeal cannot be partially dismissed and notice issued as to the remainder. The practice which prevailed was undoubtedly a convenient one, because it not infrequently happens that the Court is satisfied that there is no ground on which the conviction ought to be disturbed, but at the same time thinks that the sentence does require further consideration. Having regard to the Privy Council decision we are faced with the dilemma of either allowing a sentence, of which we disapprove, to stand, or else of incurring a considerable waste of public time and money in issuing notices to persons whom we do not desire to hear ; and in this Presidency where the High Court has heavy arrears of work, and Government suffers from chronic financial stringency, it is peculiarly desirable to avoid any waste of judicial time or public money. In our opinion however the difficulty can be overcome by reducing the sentence under our revisional powers, before we deal with the appeal.

In such cases the correct procedure, we think, is that when the appeal first comes on for hearing it should not be dismissed summarily, but should be directed to stand over, and at the same time notice should be served on Government under the revisional powers conferred upon the Court by S. 439 to show cause why the sentence should not be reduced. At the same time it will be convenient to send for the record. The notice and the appeal will then be heard on the same day. If after hearing the Government Pleader, the Court comes to the conclusion that the sentence ought to be reduced it can be reduced under the revisional powers. Having reduced the sentence the Court can then, if so minded, say that it sees no ground for interfering with the conviction or sentence, and can dismiss the appeal summarily under S. 421, Criminal P. C.

That course we have adopted in this case. We have heard the Government pleader as to the sentence, and we think that it was rather too severe. The accused was convicted under S. 366-A. She was the mother of the girl who had been kidnapped. There is no doubt, we think, that the mother was guilty of the offence charged, but the sentence of three years' rigorous imprisonment was rather too severe, and we reduce that sentence to one of one year under our revisional powers. The sentence now being one to which there is no objection, and being satisfied that there is nothing to be said against the conviction on the merits, we dismiss the appeal summarily.

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[1] Emperor v. Dahu Raut, A I R 1935 P C 89= 1935 Cr C 551 = 155 I C 386 = 37 Bom L R 557=36 Cr L J 838=62 I A 129=62 Cal 983 (P C).

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 150

BARLEE AND TYABJI, JJ.

Vishnushankar Vasantram — Accused —Applicant.

v.

Emperor — Opposite Party.

Criminal Revn. No. 245 of 1936, Decided on 1st October 1936, against order of Addl. Dist. Magistrate, Broach and Panch Mahals.

(a) Bombay District Municipal Act (3 of 1901), Ss. 46 and 48—Municipality is not empowered to enact bye-law under S. 48 relating to payment of tolls and imposing penalty for infringement of rule.

It is not within the powers of a Municipality to enact a bye-law under S. 48 of the Act imposing a penalty upon persons entering the limits of the Municipality with the intention of evading toll upon their conveyances as it imposes a penalty for the infringement of a rule. Matters relating to payment of tolls ought to be dealt with by rules under S. 46 and not bye-laws under S. 48. [P 152 C 1]

(b) Bombay District Municipal Act (3 of 1901), Ss. 46 and 48—Rules and bye-laws —Distinction between.

The rules and bye-laws differ from each other in two salient matters :

(1) Rules take effect on approval while bye-laws require previous sanction, and can be made only on following the procedure laid down.

(2) There is no provision in respect of rules similar to the one in case of bye-law permitting Municipality to prescribe fine for infringement of bye-law. [P 151 C 1]

G. N. Thakor and *B. G. Rao* — for Applicant.

U. L. Shah—for Opponent.

Facts. — The accused a resident of Godhra owned a motor car which he plied for hire between Godhra and Kalol. He used to place his car, when idle, in the garage at Godhra. The Municipality of the town, which is governed by the Bombay District Municipal Act, 1901, levied toll-tax on vehicles coming within the limits of the Municipality. The accused took his car within the limits of the Municipality without paying the toll-tax demanded from him. He was tried for evading payment of the said tax and fined. The accused applied in revision.

Tyabji, J. — We are not prepared to disturb the finding that the payment of toll has been evaded by the applicant. On this finding (subject to an argument that the applicant was not liable to pay the toll at all) the decision of this application depends on whether the Bombay District Municipal Act, 1901, (Bom. 3 of 1901), empowers the Godhra Municipality to make a bye-law to the following effect :

> (1) No person shall, with the intention of evading payment of the toll-tax take or attempt to take any conveyance liable to pay such tax into the limits of the Municipality, without paying the tax at the toll-naka.
>
> (2) A breach of this bye-law shall on conviction be punishable with fine which may extend to five rupees for each offence.

The powers of the Municipality to make bye-laws are contained in S. 48, Bombay District Municipal Act. That section empowers the Municipality (with certain restrictions not now material) to make bye-laws not inconsistent with the Act regulating the matters mentioned in its numerous clauses. The only clause of S. 48 that is relied on is the last, denominated by the letter (u). Under Cl. (u) every Municipality may make bye-laws "generally for the regulation of all matters relating to municipal administration." A prohibition against taking conveyance into the limits of the Municipality may be the subject of a bye-law if it can be brought within the terms of Cl. (t). The bye-law in question, however, cannot be brought under the Cl. (t). But it is urged that this particular prohibition falls under Cl. (u), because it regulates a matter regarding municipal administration, in this manner: that a rule—R. 152—has been framed under S. 46 of the Act by which it is prescribed that the toll in question shall be levied,—a toll under S. 3 (14) of the Act being included in the term "tax": that the prohibition in the bye-law in question subserves the rule for payment of the toll: and that the prohibition thus becomes a matter regulating municipal administration. According to this argument though a matter (like imposing a toll) may originally have to be regulated by a rule, yet after a rule has been made the enforcement of the rule may become a matter relating to municipal administration; and in that manner, the recovery of a toll may become a matter relating to municipal administration, and consequently a prohibition connected with the enforcement of the toll may be the subject of a bye-law: S. 48 (u); and then the Municipality may prescribe a fine for the infringement of the bye-law containing the prohibition by which the payment of the toll is required not to be evaded. Three steps are involved in this argument: first, a rule validly made; secondly, bye-law regulating the matter governed by the rule—which matter has by reason of the rule become a matter relating to municipal administration; and thirdly, a fine prescribed for the infringement of the bye-law (not of the rule).

The argument requires a consideration of the provisions of the Act empowering Municipalities to make rules and bye-laws. They are contained in Ss. 46—49 which constitute Ch. 4; Ss. 46, 46-A and 47 deal with rules; S. 48 deals with bye-laws, S. 49 with which Ch. 4 closes, is ancillary; copies of rules and bye-laws shall be available to the public for inspection and purchase. Under these sections rules are clearly discriminated from bye-laws. The matters to be regulated by rules are mentioned in S. 46 and those by bye-laws in S. 48. It is true that both rules and bye-laws may be made by the Municipality, and both require to be approved or sanctioned by the Governor in Council or Commissioner. But, to mention two salient matters in which they differ: (1) rules have effect when they are approved, whereas bye-laws require to be previously sanctioned; when bye-laws are proposed, their drafts have to be published and objections and suggestions received and considered: bye-laws can be made only after this procedure has been followed; (2) there is no provision in respect of rules similar to the last paragraph of S. 48, sub-s. (1), following Cl. (u) which provides that:

> Every Municipality may, with the like sanction, prescribe a fine not exceeding five hundred rupees for the infringement of any such bye-law.

A toll may be levied by the Municipality only by making a rule under S. 46, Cl. (i). That clause contains several restrictions with reference to making rules prescribing taxes: one main restriction is that such a rule can only be made subject to the provisions of Ch. 7. That long chapter (Ss. 59 to 81-A) contains detailed provisions relating to municipal taxation, to three of which I will refer. First, the imposition of a tax or a toll is covered by S. 59 (b), sub-cls. (ii) and (iii). These sub-clauses are mutually exclusive. Secondly, the elaborate preliminary procedure laid down in S. 60 is also required to be followed before a tax (or toll) can be imposed. This procedure includes the publishing of the draft rules and taking into consideration objections raised to them. Thirdly, S. 79 provides a special penalty for non-payment of any toll leviable by a Municipality.

This may seem sufficient indication that the Legislature did not intend that these two processes should be interchangeable in regard to levying a toll. Taxes and tolls are covered in detail by special provisions relating to the rules by which they may be imposed and their non-payment penalized. Can the Legislature have intended that they should be liable to be regulated cumulatively by the altogether different process of making bye-laws—a process governed by its own peculiar procedure and giving rise to distinct sanctions of its own? And yet this is what must happen if a matter primarily to be regulated by a rule is to be circuitously made the subject of a bye-law—if the evasion of a rule may be prohibited by a bye-law and the infringement of the bye-law prohibiting the evasion of the rule may be made punishable by fine. The paragraph following Cl. (u) empowers the Municipality to prescribe a fine for infringement of bye-laws. Obviously it is not contemplated by the paragraph that bye-laws should themselves impose fines; otherwise a bye-law may provide for a fine and then for infringement of that bye-law a fine may be prescribed. The language of the paragraph empowering fines to be prescribed by the Municipality is not the same as the language of the clauses empowering rules and bye-laws to be made, though fines have to be prescribed "with the like sanction."

Again the Act contains several sections imposing specific penalties for failure to comply with specified directions of a Municipality. I have already referred to S. 79. S. 155 is a general section for penalties incurred by infringements of orders and notices not punishable under any other section. The terms of such sections make it increasingly difficult to hold that it could have been the intention of the legislature to allow such a penal provision as is before us being circuitously enacted by the Municipality under the form of a bye-law. In our opinion though the bye-law relied upon purports to prohibit the taking of vehicles within certain limits it is in substance concerned with the enforcement of a toll. It consists of a prohibition against evading payment of a toll. Matters relating to payment of tolls ought to be dealt with by rules under S. 46 and not bye-laws under S. 48. That being so, assuming that the second part of the bye-law was enacted in conformity with the requirements of the paragraph permitting the prescription of fines for infringement of bye-laws and that S. 59, Cl. (b), sub-cls. (ii) and (iii) have not been in any way violated, the bye-law imposes a penalty for the infringement of a rule, and it is not within the powers of the Municipality to enact such a bye-law. We make the rule absolute, set aside the conviction, and direct the fine to be refunded.

K.B./A.L. *Rule made absolute.*

A. I. R. 1937 Bombay 152

BEAUMONT, C. J. AND MACKLIN, J.

Emperor

v.

Yemanya Kallappa and *others* — Accused.

Criminal Appeals Nos. 323 and 324 of 1936, Decided on 25th November 1936, against order of Addl. Sess. Judge, Belgaum.

(a) Criminal Trial—Acquittal—Lower Court thinking whole trial illegal because of wrong joinder of charges and acquitting accused—Order of acquittal held should be set aside.

Where in the course of recording his reasons for reference under S. 307, Cr. P. C., it occurred to the Sessions Judge that the whole trial was illegal because of wrong joinder of charges and he therefore acquitted the accused :

Held: on appeal, that if the whole trial was illegal the Judge could neither convict nor acquit, and therefore the order of acquittal ought to be set aside. [P 152 C 1]

(b) Criminal Trial—Appeal from acquittal—High Court setting aside order of acquittal but not ordering re-trial—Prosecution still has power to prosecute accused of same offence.

Where in an appeal from an order of acquittal the High Court sets aside the order of acquittal but declines to order re-trial, that does not mean that there cannot be a new trial and therefore the prosecution can prosecute the accused for the same offence for which they have never been effectively tried. [P 152 C 2; P 153 C 1]

P. B. Shingne—for the Crown.
D. R. Manerikar—for Accused.

Beaumont, C. J.—(His Lordship after narrating the facts of the case proceeded.) The case, in point of fact, falls within the decision of this Court in 34 Bom L R 590,[1] which shows that there was an improper joinder of charges, and that the trial was therefore illegal. The learned Judge thereupon came to the conclusion that he would not pursue the suggestion for a reference and he acquitted accused 1 to 5; so that by two different orders he acquitted all the accused. It is in my view clear that as the whole trial was illegal the learned Judge could neither convict nor acquit, and we are bound to set aside the orders of acquittal. The only substantial question is whether we ought to direct the accused to be re-tried. Now as accused 6 to 10 have been acquitted by the verdict of the jury and the Judge was prepared to accept that verdict, it certainly would be very hard on them that they should be re-tried because the original trial was defective entirely through the fault of the prosecuting authority in joining charges improperly. Certainly I should not be prepared to order that those accused be re-tried. In the case of accused 1 to 5 no doubt the learned Judge disagreed with the verdict of the jury, and there is a stronger case in regard to them for directing a new trial.

But on the whole, I am not prepared to adopt that course. The accused have been in jail as under-trial prisoners altogether for about six months, and as I have already observed, the defect in the proceedings was due to the mistake of the advisers of the Crown. It would I think be very difficult in a new trial to persuade another jury to disagree with the verdict of the old jury when they hear the history of the case and the length of time during which the accused have been in jail. I think that we ought not to direct a new trial. At the same time that does not in my opinion mean that there cannot be a new trial. The case is not one falling under S. 308, Criminal P. C. I know of no power in this Court to forbid the authority charged with the initiation of prosecutions from prosecuting these accused for an offence for which they have never been effectively tried. It may be that the authority may have information about the accused, which is not in our possession. All we do is to say that on the materials before us we are not prepared to direct that any of the accused should be re-tried, but at the same time we set aside the orders of acquittal. As we do not direct a re-trial, the accused who have been arrested under S. 427 must be released.

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[1] **Emperor v. Krishnaji Dange, A I R 1932 Bom 277=1932 Cr C 389=138 I C 520=33 Cr L J 619=34 Bom L R 590.**

P.R./D.S. *Order set aside.*

A. I. R. 1937 Bombay 153

BROOMFIELD AND SEN, JJ.

Emperor

v.

Jamnadas Nathji Shah and *others*—Accused.

Criminal Ref. No. 109 of 1936, Decided on 8th October 1936, made by Sess. Judge, Kaira.

(a) Government of India Act (1915), S. 107 —Scope—High Court has powers of superintendence in respect of administrative as well as judicial matters over Courts subject to its appellate jurisdiction — Powers should be rarely exercised and only when miscarriage of justice cannot be otherwise prevented.

Under S. 107 the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. The rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction. The powers of superintendence under this section of the Government of India Act are not ordinarily meant to be exercised where no power of revision or interference exists under the Code of Criminal Procedure and such power ought to be exercised only in rare cases where an obvious miscarriage of justice cannot be otherwise prevented. Such powers are not intended to be invoked in order to get round any of the express provisions of the Criminal P. C.: *A I R 1933 Bom 1, Rel. on.* [P 154 C 1,2]

Certain persons were convicted under Ss. 4 and 5, Bombay Prevention of Gambling Act, 1887. The majority of them appealed and were acquitted on the ground that the conviction was illegal as the warrant issued under S. 6, Prevention of Gambling Act, was issued by an officer not empowered to issue it. Two of the accused who failed to prefer an appeal applied in revision to the Sessions Judge. On reference to High Court :

Held : that revision could not lie in view of S. 439 (5), Criminal P. C. [P 153 C 2; P 154 C 1]

Held also : that the case being one of wrong conviction, powers of superintendence in judicial matters which vested in the Court under S. 107 of the Act could be exercised to set aside the onviction. [P 154 C 2]

(b) Criminal P. C. (1898), S. 561-A—Scope —Order under S. 561-A conflicting with other provisions of Code — Whether it can be passed (*Quaere*).

Quaere. — Whether under S. 561-A of the Code orders cannot be passed conflicting with the other provisions of the Code : *A I R 1924 Bom 485, Expl.* [P 154 C 2]

P. B. Shingne—for the Crown.

C. K. Shah—for Accused.

Sen, J. — This is a reference by the Sessions Judge of Kaira recommending that the conviction of accused 6 and 8 in a case tried by the Second Class Magistrate, Anand, under Ss. 4 and 5, Prevention of Gambling Act 4 of 1887, being illegal, may be set aside. In this case there were originally eleven accused persons. Out of them accused 3 was examined as an approver witness and accused 1, 2, 4, 5, 6, 8, 9, 10 and 11 were convicted. Accused 1, 2, 4, 5, 9, 10 and 11 appealed to the Honorary First Class Magistrate with appellate powers and were acquitted. Thereafter accused 6 and 8 made an application in revision to the Sessions Judge who has made the present reference. The learned Public Prosecutor, Nadiad, opposed this application on the ground that as the applicants had not appealed, no proceedings by way of revision could be entertained at their instance under S. 439 (5), Criminal P. C. The learned Sessions Judge has thus stated his grounds for making the present reference :

> The learned Public Prosecutor concedes that if this matter had come to my notice otherwise than through the present application, I could have referred it to the Honourable High Court and recommended the setting aside of the learned trial Magistrate's order. Indeed if we construe S. 439 (5), Criminal P. C. too literally, the position would be that I could dismiss the present application and then having come to know of this matter could address a letter to the Honourable High Court under S. 438, Criminal P. C., and recommend the quashing of the learned trial Magistrate's order. There would be hardly any propriety in that sort of procedure, and that being so, in the interests of justice, I submit these papers to the Honourable High Court.

On a perusal of the appellate Court's judgment it seems to us beyond doubt that the conviction of the accused by the Second Class Magistrate was legally wrong. The question that has been put by the Sessions Judge is however whether it is possible to entertain in revision any proceedings at the instance of such accused persons as have not appealed. On this point it seems to us that the language of sub-s. (5), S. 439 is abundantly clear. It does not seem to us that those words are capable of more than one interpretation, viz., that where the party in question has not appealed, no application made by him in revision can be entertained by the Court. We must therefore hold that the present application made by accused 6 and 8 ought to have been rejected.

Apart from the specific ground of the present reference however the learned advocate who has appeared for accused 6 and 8 has raised the question whether it is not open to us, in view of the definite finding of the learned Sessions Judge that the conviction of these accused persons is legally wrong to give any relief to them. This case is peculiar in this respect that the majority of the accused convicted by the trial Court preferred appeals which were decided in their favour and that for some reason or other only these two accused persons did not appeal. If there had been no such appeal, there would have been no question of examining whether any relief apart from the provisions of the Criminal Procedure Code could be given to them. Even if the learned Sessions Judge had moved this Court under S. 438, Criminal P. C., it is very doubtful whether such reference would have been entertained. The judgment however of the appellate Court clearly shows that the warrant issued under S. 6, Prevention of Gambling Act, was issued by an officer not empowered to issue it, that therefore the presumption arising under S. 7 of the Act did not arise, that the approver's evidence was unreliable and that thus there was no sufficient evidence against the accused. This is thus an obvious case of illegal or wrong conviction. The powers of this Court of superintendence under S. 107, Government of India Act, were examined in 34 Bom L R 1523,[1] and it was held (p. 1545) :

> Under S. 107 the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. It is not disputed that rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and that under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction.

It is obvious that the powers of superintendence under this section of the Government of India Act are not ordinarily meant to be exercised where no power of revision or interference exists under the Code of Criminal Procedure and that such power ought to be exercised only in rare cases where an obvious miscarriage of justice cannot be otherwise prevented. It is clear that such powers are not intended to be invoked in order to get round any of the express provisions of the Criminal Procedure Code. It seems to us however that this being a case of wrong conviction on the face of it, it is desirable in this case to use the power of superintendence in judicial matters which vests in this Court under S. 107, Government of India Act. In the exercise of such power therefore we would set aside the conviction and sentence and direct that the fine, if paid, should be refunded. The learned advocate for accused 6 and 8 also invited us to use our powers under S. 561-A, Criminal P. C. He contended that the terms of this section were wide enough to enable us to correct the illegality and set aside the conviction. Our attention has been invited to 26 Bom L R 719,[2] the first part of the head-note of which runs thus :

> The Court will not pass any orders under S. 561-A, Criminal P. C., which would conflict with any of the provisions of the Code.

This part of the head-note appears to be based on the following remarks in the judgment (p. 720) :

> We do not think that we could make any order which would conflict with the provisions of S. 89, Criminal P. C., in the exercise of our inherent powers to which a reference has been made.

This was a case in which an application was made to the Court under S. 89, Criminal P. C., beyond the period of limitation prescribed in that section and the application was dismissed on the ground of lapse of time. It was held by Shah, Ag. C. J., that this order appeared to be correct, and it seems that in this case there was no obvious illegality that required to be corrected. It does not seem to us that the sentence quoted above was intended to lay down a general proposition that the provisions of S. 561-A, Criminal P. C., could not be used for passing any orders conflicting with any other provisions of the Code. As however we have already decided to act under the general powers of superintendence granted by S. 107, Government of India Act, it is not necessary to decide this specific point. The order therefore will be as proposed above.

K.B./A.L. *Order accordingly.*

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[1] Emperor v. Balkrishna Phansalkar, A I R 1933 Bom 1=1933 Cr C 1=141 I C 720=34 Cr L J 199=34 Bom L R 1523=57 Bom 93 (S B).

[2] *In re* Gurunath Narayan, A I R 1924 Bom 485=82 I C 365=25 Cr L J 1293=26 Bom L R 719.

✲ A. I. R. 1937 Bombay 155

BEAUMONT, C. J. AND KANIA, J.

Liladhar Chaturbhuj — Defendant—Appellant.

v.

Harilal Jethabhai—Plaintiff—Respondent.

O. C. J. Appeal No. 19 of 1936, Decided on 13th October 1936.

✲ (a) Evidence Act (1872), S. 114 — Presumption — Accident — Suit for damages—Plaintiff proving that car then belonged to defendant—Presumption arises that car was driven by servant or agent of defendant—Burden of proving that car was not under his control then shifts on to defendant.

In an action for damages for injury due to motor car, proof by plaintiff that the car which caused the accident belonged at the time of accident to defendant raises a presumption that the driver of the car was the defendant's servant. It is for the defendant to prove that at the time of the accident the car was not under his control: *Joyce* v. *Capell*, *(1838) 8 Car & P 370*; *Hibbs* v. *Ross*, *(1866) 1 Q B 534* and *Barnard* v. *Sully*, *(1931) 47 T L R 557*, *Rel. on.* [P 156 C 2]

(b) Tort—Damages—Measure of—Injury in accident—Evidence of plaintiff's doctor that permanent injury is still left — Damages should be determined on consideration of medical evidence—Judge should not act on his own opinion.

In a suit by plaintiff for damages for injury sustained by him in a motor accident, five years ago, there was a conflict of medical evidence as to whether any permanent injury was left or not. The plaintiff's doctor who treated plaintiff from the beginning said that the plaintiff still limped and there was a permanent defect left; while the defendant's doctor said that he ought not to limp. The Judge made the plaintiff walk in the Court and determined the amount of damages on his own opinion:

Held: that the Judge was not justified in acting upon his own opinion as to the condition of the plaintiff after seeing him walk in the Court. He ought to have determined the measure of damages on the basis of medical evidence. [P 157 C 1]

Jamshed Kanga and *B. K. Desai*—for Appellant.

M. C. Chagla, *F. J. Coltman* and *Mrs. Tata Lam*—for Respondent.

Beaumont, C. J. — This is an appeal from a decision of Rangnekar, J. The plaintiff's case is that on 25th July 1930, when he was a boy about 13 years of age, he was knocked down by a motor car, and severely injured. He claims that the motor car in question was owned by the defendant, that it was driven by one Bhikhalal, who was a servant of the defendant, and that it was driven negligently. The burden of proving all those facts is upon the plaintiff. It is not disputed in this appeal that the accident took place, that the car which caused the accident belonged to the defendant, that it was driven by Bhikhalal, and that it was driven negligently. But the defendant denies that Bhikhalal was his servant. His case is that this car was one of several cars which he used to let out for hire as taxis, that the practice was for the driver of the car merely to pay so much a day for it, and that the driver was not the servant of the defendant, but was in the position of a bailee. That was the general practice, but he says in the case of this particular car that on the day of the accident he had lent it to a man named Kakoo, who was one of the persons who used to hire his taxis, but Kakoo had taken it out that day for his own purpose, and had left it outside a teashop, from which it was removed by Bhikhalal. Defendant says he knows nothing about Bhikhalal. The learned Judge disbelieved most of the defendant's evidence, but that does not establish the plaintiff's case. The plaintiff has to prove that at the time of the accident the driver of the car was a servant of the defendant, and the fact that the defendant sets up a false case as to his relationship with Bhikhalal, (matter within the defendant's knowledge and which he ought to prove under S. 106, Evidence Act) cannot, in my opinion, relieve the plaintiff of the burden of proving his case.

The way the plaintiff puts his case is this. He says, on proof that at the time of the accident the car which knocked him down belonged to the defendant, a presumption arises that the person who drove the car was a servant of the defendant, and that it is for the defendant to displace that presumption. It seems to me that the short point in this case is whether that proposition is right. It is a proposition of very considerable importance, having regard to the very large number of motor cars now in use and the frequency with which accidents occur, and are likely to continue to occur. There are four English cases which seem to me to establish the accuracy of that proposition. The first one is (1838) 8 Car & P 370.[1] In that case damage had been caused to the plaintiff's lug-boat by the defendants' barge, and it was held by Lord Denman, C. J.

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[1] Joyce v. Capell, (1838) 8 Car & P 370.

that proof that the barge belonged to the defendant was prima facie evidence that the person who was steering the barge was the defendants' servant. The learned Chief Justice says (p. 371):

> If the barge was on hire that will be for the defendants to show. The barge being the barge of the defendants, there is prima facie evidence that the bargeman was their servant till they explain it.

Then the next case is (1866) 1 Q B 534.[2] In that case a ship was laid up in a public dock under the care of a ship-keeper. The plaintiff being lawfully on board suffered injury from the negligence of the person in charge of the ship, and brought an action against the defendant. It was proved that the defendant was the owner of the ship, and it was held by the Court of Queen's Bench that that fact was prima facie evidence for the jury from which they might draw the inference that the persons in charge of the ship were employed by the defendant. Then there is a case unreported, but referred to in 47 T L R 557,[3] to which I will refer in a moment. The unreported case is *Redmond* v. *Griever*, which was decided in 1926 by a Divisional Court consisting of Salter and Talbot, JJ. That case seems to have decided the exact point which we have to consider. It was a case of an accident caused by a motor car, and the Court held that proof of the ownership of the vehicle which caused the accident furnished prima facie evidence that the vehicle was at the material time being driven by the defendant, his agent or servant. That case was followed by the Court of appeal in 47 T L R 557.[3] Why cases which deal with a matter of such general importance were not thought fit to be reported in the official law reports I do not know; in England, however, that matter rests in the discretion of the Law Reporter, and not of the Court. The case in 47 T L R 557[3] was again a case of a motor car which had caused an accident by which the plaintiff's property had been damaged, and the plaintiff brought a suit in the County Court. The County Court Judge withdrew the case from the jury on the ground that there was no evidence that the motor car was being driven by the defendant or his servant or agent.

In the Court of appeal it was held that proof of the ownership of the car afforded prima facie evidence that the driver at the time of the accident was the agent or servant of the owner, and that the case ought not to have been withdrawn from the jury. Those cases clearly establish the principle that in an action of this sort, proof by the plaintiff that the car which caused the accident belonged at the time to the defendant, affords prima facie evidence that the driver of the car was the defendant's servant. The defendant, of course, can displace that presumption, and in this case he endeavoured to do so. He set up a story which the Court disbelieved, and I see no reason for thinking that the Court was wrong in disbelieving it. That leaves the case where it was before the defendant called his evidence, and it does not displace the presumption on which the plaintiff relies. The evidence called on behalf of the plaintiff affords a certain amount of support to the contention that the driver was a servant of the defendant, because the plaintiff's first witness Mohanlal, who was an eyewitness of the accident, says that he knows the car which caused the accident; he had used it many times as a taxi, and it had been driven by the man Bhikhalal who was driving it at the time of the accident. That seems to show that Bhikhalal had been connected with this car before the date of the accident, and tends to displace the defendant's story that Bhikhalal was a complete stranger to him. But Mohanlal's evidence does not, of course, establish the relationship which existed between Bhikhalal and the owner of the car; he would not know whether the driver of the car was a servant or a bailee.

Ultimately this case must depend on whether we accept the principle established by the cases to which I have referred, and I have no hesitation in accepting it. It seems to me only commonsense to hold that if an accident is caused by a car belonging to the defendant, the defendant must prove that at the time of the accident the car was not under his control. I may say that I do not myself attach any importance to the letter, Ex. B, on which the learned Judge relied, as an admission by Bhikhalal as to his being the defendant's servant, and which was admitted in evidence under S. 19, Evidence Act. I think that the letter is not admissible under that section, because it does not show in terms that Bhikhalal had any relationship whatever with the defendant, and such relationship as he had must, on the terms of the letter, have come to an end before he wrote the letter, because he says that he had gone away after the accident to Surat. In the face of that, I do not think it can be said that, even if the letter amounted to an admission that he was a servant of the defendant at the time of the accident, that relationship continued. However, in my view the plaintiff is entitled to succeed on the ground which I have mentioned.

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[2] Hibbs v. Ross, (1866) 1 Q B 534=9 B & S 655 =35 L J Q B 193=12 Jur (N S) 812=15 L T 67=14 W R 914.

[3] Barnard v. Sully, (1931) 47 T L R 557.

With regard to the damages, the plaintiff claimed Rs. 75,000, a sum which was clearly excessive. The learned Judge awarded Rs. 8,000. The evidence was that the actual medical expenses of the plaintiff, which he proved, amounted to Rs. 1,000, but the doctor said that he had advised massage, which would have been extra. However there is no proof that anything definite was spent on massage. There was a conflict of medical evidence when the boy was examined five years after the accident, as to whether any permanent injury had been left or not. I think one is entitled to rely on the plaintiff's doctor, who says that the boy still limps, although the defendant's doctor says he ought not to limp. The boy may, to some extent, after having been laid up for such a long time with this accident, be unable to make the fullest use of his injured limb, not because of any physical injury, but because of nervous disability. At any rate we have got the evidence of the plaintiff's doctor that the boy still limps.

I do not think the learned Judge was justified in acting on his own opinion as to the condition of the boy after seeing him walk in Court. Judges are bound to act on evidence, and are not experts on anything except law. But I think the learned Judge was entitled to take into account the fact that this boy spent about six months away from school, three months actually in hospital, and that he lost the benefit during his boyhood of being able to run about and play games with other boys, and the enjoyment of normal health. In the circumstances I do not think the sum which the learned Judge awarded can be said to be excessive or that we ought to interfere. I think, therefore, the appeal fails, and must be dismissed with costs.

Kania, J.—I agree. On a consideration of the evidence the Court has to determine whether Bhikhalal was driving the car at the time of accident as a servant or agent of the defendant. The burden of proving that is on the plaintiff. According to the authorities discussed by the learned Chief Justice in his judgment, which are also referred to by the learned trial Judge in his judgment, it appears to be the law in England that on proof of ownership there arises a presumption in the case of a ship, or a motor car, in the event of an accident, that the same was under the control and being driven by a servant or agent of the owner. On that presumption, the failure of the defendant to establish that he had let out the car, would not deprive the plaintiff of his right to get the relief prayed for. In the present case even if the letter of 25th August were rejected from evidence, I think, there is sufficient evidence to find, as a fact, that Bhikhalal was a servant of the defendant. For this purpose the admission of the defendant in his written statement that he plied the cars, including the car in question, as taxis is very material. That admission must mean that when the cars were being plied as taxis he was the owner and got the benefit of the trade. It is not suggested in the written statement that Bhikhalal had rented the car from the defendant at the time and was thus in complete and independent control of the car. The suggestion for the first time made in the witness-box, that the defendant was giving cars to different persons to be plied as taxis has been rightly rejected by the learned trial Judge. He has disbelieved the defendant's evidence. On the admission contained in the written statement the defendant has admitted that he was plying the car in question as a taxi. By that evidence, coupled with the evidence of Mohanlal, plaintiff has discharged the burden which lay on him. As the defendant's evidence is disbelieved the finding on this question of fact must be in favour of the plaintiff. On the other points I agree with the judgment just delivered by the learned Chief Justice and have nothing more to add. The appeal must, therefore, be dismissed with costs.

W.D./A.L. *Appeal dismissed.*

✻ A. I. R. 1937 Bombay 158

BROOMFIELD AND WASSOODEW, JJ.

Chimanlal Ganpat and *another*—Appellants.

v.

Rajaram Maganchand Oswal — Respondent.

Letters Patent Appeal No. 8 of 1936, Decided on 2nd November 1936, against decision of Divatia, J., in F. A. No. 196 of 1935.

✻ **(a) Guardians and Wards Act (1890), S. 25 —Court appointing guardian residing outside its jurisdiction, of minor on taking security from person residing within its jurisdiction —Order is legal.**

There is no legal prohibition against the appointment of a person as guardian who is not residing within the jurisdiction of the Court, though naturally the Courts would as an ordinary rule be reluctant to make such an order. [P 159 C 2]

An application for the custody of a minor girl was made under S. 25 by her paternal uncle residing outside the jurisdiction of the Court. It was found that the girl with her mother lived with him since her father's death and both were maintained by him. The Court appointed the applicant as her guardian, on taking security from a person who resided within its jurisdiction :

Held : that in the special circumstances of the case the order appointing the applicant as guardian of the minor was proper, even though he lived outside the jurisdiction of the Court : *A I R 1933 All 780, Rel. on* ; *A I R 1931 Mad 478* and *A I R 1914 All 541, Disting.* [P 159 C 2]

(b) Guardians and Wards Act (1890), Ss. 4 (5) and 25—Court can exercise jurisdiction only when minor is 'ordinarily resident' within its jurisdiction.

In order to give the Court jurisdiction under S. 25 the minor must be 'ordinarily resident' within the local limits of the jurisdiction of the Court in view of the definition of 'Court' in S. 4 (5) of the Act. [P 159 C 2]

A. G. Desai and *S. G. Chitale*—for Appellants.

S. G. Patwardhan—for Respondent.

Broomfield, J.—This is an appeal under the Letters Patent from a judgment of Divatia, J., confirming an order of the District Judge of Poona, by which the respondent was appointed guardian of his minor niece Lilavati and it was directed under S. 25, Guardians and Wards Act, that she should be restored to his custody from that of the opponents. The respondent who made the application to the District Court is the paternal uncle of the minor girl. The appellants are the persons who opposed that application. Opponent 1 is the maternal uncle of the girl and opponent 2 is his brother-in-law. According to the findings of the lower Courts, which have not been seriously disputed, the respondent, i. e., the paternal uncle, who is a resident of Kolhapur State, brought up the minor and maintained both her and her mother from the time of her father's death. It appears that the girl now and again visited her other relations who resided in Poona, but for the greater part of the time she was with the respondent in Kolhapur. It is not disputed that he was and is her guardian. In April 1934, she was taken away by the opponents to the Poona District. While she was staying with them in August 1934, arrangements were made for her marriage to a young man who resides at Supa, also in the Poona District. The relations of the girl all approve of this marriage but the maternal uncle and also opponent 2 object to a term of the agreement by which the girl's guardian, the paternal uncle, is to receive a sum of Rs. 2,000 from the father of the bridegroom. The learned District Judge has found that this is in accordance with the custom of the community to which the parties belong, that there is nothing unusual or objectionable in it and that the opponents are not actuated by any concern for the welfare of the minor but are simply trying to maintain their personal views about the marriage which they have supported by perverting the facts. They have apparently tried to prevent the payment of the money to the paternal uncle and declined to allow the girl to return to him when he wanted her back. Accordingly, in January 1935, he made the application under S. 25, Guardians and Wards Act, which has given rise to this appeal.

The District Judge was of opinion that it was for the welfare of the minor that she should be restored to the custody of her guardian. Divatia, J. evidently agreed with him and on that matter of discretion we see no reason whatever to interfere with the view taken by the lower Courts. The only point of substance in the appeal is whether the District Judge, Poona, had jurisdiction to appoint the respondent guardian of this minor girl and to make the order under S. 25 in his favour. The question arises by reason of the fact that he does not reside within the jurisdiction of the District Court but in the State of Kolhapur. Mr. A. G. Desai, who appears for the appellants contends that the Court had no jurisdiction. He relies on the following provisions of the Guardians and Wards Act. Under S. 1 (2), the Act extends to the whole of British India. In S. 9 (1) it is provided that applications with respect to the guardianship of the person of a minor are to be made to the District Court having jurisdiction in the place where the minor ordinarily resides. In S. 26 it is laid down that a guardian of the person appointed or declared by the Court shall not without the leave of the Court remove the ward from the limits of its jurisdiction. S. 39 provides for the removal of a guardian on certain grounds. One of the grounds on which he may be removed is for ceasing to reside within the local limits of the jurisdiction of the Court. Lastly S. 44 provides that a guardian may be punished by fine or imprisonment if he removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of S. 26. Mr. Desai's argument is that it is against the spirit, if not actually against the letter, of the Act to appoint a person as guardian who is resident outside the jurisdiction or to make an order under S. 25 in favour of such a person. In support of this proposition he relies on 54 Mad 758[1] and 36 All 280.[2] In the former case it was held that it is clearly against the intention of the Guardians and Wards Act that anyone residing outside British India should be appointed guardian of a minor's person, as over such a guardian the Court could not exercise its proper control.

There is no discussion of the provisions of the Act in the judgment. It may be mentioned also that in the present case the District Judge has required security to be furnished with a surety resident in the Poona District and thereby the carrying out of any orders that the Court might think fit to make have been ensured. In 36 All 280[2] it was held that the Guardians and Wards Act contemplates that an applicant should reside within the jurisdiction of the Court to which he makes the application. Here also no detailed reasons are given. The case has been referred to and distinguished in a later case of the same High Court (A I R 1933 All 780[3]) where it has been held that the remarks in this connexion in the earlier case were obiter dicta and not intended to lay down any universal rule, and that there is nothing illegal in appointing a person resident outside the jurisdiction as guardian in a proper case. This is the view of the law which has been accepted by Divatia, J. He points out that it is nowhere enacted specifically in the Act that no person shall be appointed as a guardian who does not reside within the jurisdiction of the Court. S. 39 (h) empowers the Court to remove a guardian for ceasing to reside within the jurisdiction but does not say that he must be removed as a matter of course. In all proceedings under the Act the paramount consideration is the welfare of the minor, and if it were to be held that in no circumstances could a person residing outside the jurisdiction be appointed guardian, the Court might be prevented from making the appointment which most conduced to the minor's welfare. Divatia, J. says in this connexion :

> If the law were that only a person living within the jurisdiction of the Court could be appointed a guardian, then in some cases the consequences may be disastrous, as it may permit an unscrupulous person to prevent the well-wishers of the minor from being appointed guardian, by inducing the minor to remove himself and his property from the district in which his friends and relatives most competent to act as his guardian reside.

That, according to the learned Judge, is precisely what has happened in the present case. We agree with the learned Judges below in holding that there is no legal prohibition against the appointment of a person as guardian who is not residing within the jurisdiction of the Court, though naturally the Courts would as an ordinary rule be reluctant to make such an order. The same applies to orders under S. 25. Here we think the special circumstances of the case justify the orders made by the District Judge. It is to be noted of course that in order to give the Court jurisdiction the minor must be "ordinarily resident" within the local limits of the jurisdiction. That is provided, so far as the appointment of a guardian is concerned, by S. 9 (1), and as regards S. 25 the word "Court" is mentioned there and "Court" is defined in S. 4 (5) as the District Court having jurisdiction in the place where the ward for the time being ordinarily resides. In view of the fact already mentioned, that the minor has spent the greater part of her short life with the respondent in Kolhapur, there might have been some difficulty in this connexion, but since April 1934 she has admittedly been residing with the opponents in the Poona District. At the time the application was made in January 1935 she had already been residing with them for eight months. The husband with whom her engagement has been made is a resident of Poona. If the application under S. 25 had not been made at all she would doubtless have continued to reside at Poona. Under these circumstances we think that it can be said that she was ordinarily residing within the jurisdiction of the District Court of Poona at the material time both for the purpose of appointment of a guardian and for the purpose of an order under S. 25. I may say that there appears to have been no dispute on this point either in the District Court or before Divatia, J., it being common ground apparently that the minor must be taken to be ordinarily resident in Poona. We hold, therefore, that the appeal fails and must be dismissed with costs.

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[1] Subbarathnammal v. Seshachalam Naidu, A I R 1931 Mad 478=132 I C 320=54 Mad 758=60 M L J 615.

[2] Asghar Ali v. Amina Begam, A I R 1914 All 541=24 I C 59=36 All 280=12 A L J 392.

[3] Beni Prasad v. Mt. Parwati, A I R 1933 All 780=147 I C 217=1933 A L J 1333=56 All 20.

K.B./A.L. *Appeal dismissed.*

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* A. I. R. 1937 Bombay 160

BROOMFIELD AND SEN, JJ.

Rudragouda Rachangouda Patil and *others*—Accused—Appellants.

v.

Emperor — Opposite Party.

Criminal Appeals Nos. 333 and 328 of 1936, Decided on 7th October 1936, against sentences of Sess. Judge, Dharwar.

*** (a) Criminal P. C. (1898), S. 197—President of Taluka Local Board is 'public servant'—He is removable from office only with sanction of Government — Previous sanction of Local Government is necessary for his trial for offence committed by him in discharge of duties—Trial without such sanction is illegal.**

The President of Taluka Local Board is a 'Public Servant' within the meaning of S. 21, Penal Code, and S. 135, Bombay Local Boards Act. Under S. 26 of the Act, he is removable from office, as such President, by the Local Government and by no other authority. The criminal Courts have therefore no jurisdiction to take cognizance of any offence or offences committed by him while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Local Government under S. 197 of the Code. A trial therefore of such President without the necessary sanction is illegal, and conviction based upon it cannot stand.
[P 160 C 2 ; P 161 C 2]

(b) Criminal Trial—Jurisdiction — Trial as to part illegal for want of jurisdiction—Illegality vitiates whole proceeedings—Conviction based thereon cannot stand.

Where a person is charged with two offences but the trial of such person with respect to one of them is without jurisdiction by the Court, such trial is illegal and even though there be trial with respect to the other offence, the illegality committed vitiates the whole proceedings and the conviction based thereon cannot stand: *9 Bom 288* (*F B*) and *25 Mad 61* (*P C*), *Rel. on.*
[P 161 C 2 ; P 162 C 1]

G. C. O'Gorman, *K. G. Datar* and *S. B. Jathar*—for Appellants.

P. B. Shingne—for the Crown.

Sen, J.—These appeals have been preferred by Rudragouda Rachangouda Patil, accused 1, and Kallayya Ulavayya Hiremath, accused 2, who have been convicted respectively under Ss. 409 and 466 and under S. 409 read with S. 109, I. P. C. The accused as well as a third person, Subbaya Venkaya Havalad, were prosecuted under Ss. 409, 409 read with S. 109, 466, 466 read with 109, and 467, I. P. C. Accused 3 was acquitted, accused 1 is the President of the Taluka Local Board of Kalghatgi, and accused 2 is the sub-overseer of the same Taluka Local Board. At the trial the learned Sessions Judge has not considered the question which was mainly argued before us in this appeal, viz., whether the Court had jurisdiction to try this case in view of the provisions of S. 197, Criminal P. C. That section runs thus:

> When any person who is a Judge within the meaning of S. 19, I. P. C., or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the local Government.

There is no doubt that accused 1 is a "public servant" as defined in S. 21, I. P. C. and S. 135, Bombay Local Boards Act 6 of 1923. Under S. 26, Bombay Local Boards Act, he is removable from office as President of the Taluka Local Board by the Government for misconduct, or neglect of or incapacity to perform his duty. It has been contended by Mr. O'Gorman for the appellants that as accused 1 was not removable from his office save by or with the sanction of the Local Government, the Court had no jurisdiction to take cognizance of or try the offences. The learned Government Pleader has drawn our attention to the provisions of S. 31, Bombay Local Boards Act, which runs as follows:

> The Government in the case of a District Local Board, and the commissioner in the case of a Taluka Local Board, may, if it or he thinks fit, on the recommendation of the Local Board, remove any member of such Local Board, elected or appointed under this Act, after giving him an opportunity of being heard and after such inquiry as the Government or the commissioner, as the case may be, deems necessary if such member has been guilty of misconduct in the discharge of his duties, or of any disgraceful conduct, or has become incapable of performing his duties as a member of the Local Board.

This section, it will be seen, empowers the commissioner to remove any member of a Taluka Local Board, and the learned Government Pleader has contended that as accused 1 is not only the President but also a member of the Taluka Local Board, and as the commissioner has power to remove him as such member from such Board, on such removal he would automatically cease to be President of the Taluka Local Board. That being so, it is argued that there are more than one ways in which the President of the Taluka Local Board can be removed from his office under the Act, viz. (1) by Government under S. 26, and (2) by his removal as a member under S. 31 resulting necessarily in his removal from the office of the President. The argument is no doubt ingenious, but having given the matter our fullest consideration, we feel that it does not adequately meet the contention raised by Mr. O'Gorman. It is true that under S. 31 the commissioner may remove a member of the Taluka Local Board and that the effect of such removal would be, if such member was President of the Taluka Local Board, that he would cease to be such President. But accused 1 has been tried as President of the Taluka Local Board of Kalghatgi, and the question that arises in deciding whether S. 197, Criminal P. C., applies is whether he cannot be removed as President of the Taluka Local Board save by or with the sanction of the Local Government or some higher authority. It is clear from the terms of S. 31, Bombay Local Boards Act, that the commissioner has no authority to remove a President of the Taluka Local Board as such President. All he can do is to remove him as a member of the Board. There is no doubt that the provisions of S. 197 have reference to such provisions in different Acts as are contained in the present instance in S. 26, Local Boards Act, which expressly lays down that every President or Vice-President shall be removable from office, as such President or Vice-President, by the Local Government for misconduct, or neglect of or incapacity to perform his duty. It must, therefore, be held that a President of a Taluka Local Board cannot be removed from his office *qua* such President save by the Local Government. That being our opinion, we must hold that in the present case the Court had no jurisdiction to take cognizance of any offence or offences committed by accused 1 or alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Local Government.

Accused 1 has been convicted under two sections 409 and 466. The charge as to the latter section relates to an alleged forgery in respect of an order dated 4th August 1935, passed by accused 1 directing the work which is the subject matter of this case to be done by one Kallappa, who, according to the prosecution, had nothing to do with the execution of the work. The learned Sessions Judge has held in respect of this offence that the order, Ex. 25, is a document which purported to have been made by accused 1 in his official capacity and nothing has been urged before us against this view. The order is signed by the accused as President of the Taluka Local Board, and there can be no doubt from the evidence that the order in question purports to have been passed by accused 1 in his official capacity as such President. That being so, it is clear that so far as this offence is concerned, the Sessions Court had no authority to try accused 1 without the sanction of the Local Government under S. 197, Criminal P. C. It, therefore, becomes unnecessary, in our opinion, to examine the question whether the other act of accused 1 alleged to constitute an offence under S. 409 was also done or purported to be done by him in the discharge of his official duty. It is clear from 9 Bom 288,[1] as well as from

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[1] Queen-Empress v. A. Morton, (1885) 9 Bom 288 (F B).

the principle enunciated in 25 Mad 61[2] that where the Court has acted without jurisdiction with regard to a part of the trial, the whole proceedings are vitiated by the illegality committed and that any conviction based on such proceedings cannot stand. This principle would apply not only to the trial of accused 1 under S. 409 but also to the trial of accused 2 in the present case. We must, accordingly, set aside the convictions of both the accused and direct that any fine paid by accused 1 be refunded. This of course will be without prejudice to any fresh proceedings that may be taken with the proper sanction of Government under S. 197. As regards accused 2, we may remark that even on the finding of the learned Sessions Judge, viz., that accused 2 assisted accused 1 in allowing Kallappa to draw the amount of Rs. 276-14-0, there does not appear to be sufficient material to sustain his conviction under S. 409 read with S. 109, I. P. C. It is, therefore, doubtful whether there would be any sufficient case for proceeding against him in case it is decided to take fresh proceedings in this matter. The bail bonds should be cancelled.

Broomfield, J.—We have had to dispose of these appeals on a preliminary point that was not taken in the lower Court but one which goes to the root of the case. Accused 1 is the President of the Taluka Local Board of Kalghatgi. He is a statutory public servant under S. 135, Bombay Local Boards Act. Under S. 26 (1) of the Act it is provided that a President or a Vice-President shall be removable from office, as such President or Vice-President, by the Local Government. Prima facie, therefore, S. 197 Cl. (1), Criminal P. C., applies, and the District Magistrate could not take cognizance of the case without the sanction of the Local Government. The learned Government Pleader made an ingenious attempt to get out of this difficulty by relying on S. 31 of the Act where it is provided that in the case of a Taluka Local Board the commissioner may remove any member of the board for misconduct. The argument is that the comissioner can indirectly remove a President of a Taluka Local Board from his office as President by removing him from his office as a member. The learned counsel for the appellants contends that as the term of office of President and Vice-President and their liability to be removed are specifically dealt with in S. 26, S. 31 must be taken to refer to members other than a President or Vice-President. That is a doubtful proposition. But whether that be so or not, I think the language of S. 197, Criminal P. C., was intended to apply to such express provisions as to removability as we find in S. 26 (1) and not to indirect powers such as it is suggested the commissioner may possess. There is in fact an obvious correspondence between the language of S. 197 and that of S. 26 (1), Local Boards Act. The commissioner could not remove the accused *qua* President. He could only remove him, if at all *qua* member. But he has been prosecuted *qua* President. The argument of the learned Government Pleader would render the provisions of S. 26 (1) practically superfluous in the case of the Taluka Local Board. I agree, therefore, that sanction was necessary to the trial of accused 1 on the charge of forgery at any rate, and that no sanction having been obtained the whole trial must be considered to be invalid.

K.B./A.L. *Conviction set aside.*

* A. I. R. 1937 Bombay 162

FULL BENCH

BEAUMONT, C. J., RANGNEKAR AND KANIA, JJ.

Murlidhar Shrinivas—Appellant.

v.

Motilal Ramcoomar—Respondent.

O. C. J. Appeal No. 25 of 1936, Decided on 14th October 1936.

*** Limitation Act (1908), Art. 151 and S. 12 (2)—Appeal from decree—In computing time, period requisite for obtaining copy can be excluded though application for copy of decree is made after expiration of time limited for appeal:** *23 Bom 442* **and** *15 Bom L R 681=20 I C 537, Overruled.*

The Court cannot impose upon statutory right of an appellant a restriction not warranted by the Act and a rule providing that no time shall be allowed for obtaining a copy of the decree unless such copy be applied for within 20 days from the date of the decree would be ultra vires. So in computing the time for appealing from a decree, it is legitimate (in a proper case) to exclude the period requisite for obtaining a copy of the decree even when no application for such copy was made till after the expiration of the time for appeal. The question whether the time was requisite is always one of fact to be decided in the circumstances of each case: *23 Bom 442* and *15 Bom L R 681=20 I C 537*, **Overruled.** *Case law reviewed.* **[P 163 C 1, 2; P 164 C 1, 2]**

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[2] **Subrahmania Ayyar v. Emperor, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P C).**

F. J. Coltman and *C. K. Daphtary*—for Appellant.

Jamshedji Kanga and *M. C. Setalvad*—for Respondent.

Beaumont, C. J.—In this case the following questions have been referred to a Full Bench:

> 1. Whether in computing the time for appealing from a decree, it is legitimate (in a proper case) to exclude the period requisite for obtaining a copy of the decree when no application for such copy was made till after the expiration of the time limited for appeal? 2. Whether 23 Bom 442[1] and 15 Bom L R 681[2] are good law?

The facts in the appeal, so far as necessary for the determination of the questions referred, are as follows. The judgment was given on 6th March 1936, and, according to the practice prevailing in this Court, that date is the date of the decree. On the same date the appellant applied for a copy of the judgment, and on 19th March a copy was supplied to his attorneys. On 9th April the appellant applied for a copy of the decree. The decree was sealed on 20th April. But the draft approved by the attorneys of the appellant and respondents was first submitted to the Prothonotary on 24th March. This appeal was filed on 23rd April. A preliminary objection was taken that the appeal is out of time, since it was filed more than 20 days after the date of the decree, and no extension of time can be allowed for obtaining a copy appealed from, as no copy of such decree was applied for within 20 days and such extension as is allowable for obtaining a copy of the judgment. It was argued that this is the view which has been taken in decisions of this Court, and it was for the purpose of considering the correctness of these decisions that the matter was referred to a Full Bench.

Under Art. 151, Lim. Act, the time for appealing is 20 days from the date of the decree. But that article has to be read in conjunction with S. 12, sub-ss. (2) and (3). Sub-s. (2) provides that in computing the period of limitation prescribed for an appeal, the day on which the judgment was pronounced and the time requisite for obtaining a copy of the decree shall be excluded. Under sub-s. (3) the time requisite for obtaining a copy of the judgment is also to be excluded. The contention of the respondents is that under Art. 151 time commenced to run on 6th March 1936, that being the date of the decree, and that in computing the time for appeal the period between 6th and 19th March, when the copy of judgment was supplied, has to be excluded, that accordingly the time for appealing expired on 8th April before any application for a copy of the decree had been made, and that being so, according to the decisions of this Court, no time can be allowed for obtaining a copy of the decree.

Apart from authority, the effect of Art. 151 and S. 12, Lim. Act, read together, seems to me to be this: the starting point of time is the date of the decree, and the finishing point is the date when the appeal is filed. If the period between those two dates exceeds 20 days, or the time limited by the appropriate article of the Limitation Act, the Court has to see whether the excess of time was requisite for obtaining a copy of the decree and a copy of the judgment. If it was so requisite, the appeal is in time, if not, it is out of time. The meaning of this section has recently been considered in two decisions of the Privy Council, 49 I A 307[3] and 55 I A 161,[4] and the effect of those decisions is to show that the time requisite does not mean the time actually required, but the time properly required for obtaining copies of the decree and the judgment. If the time actually taken in obtaining the copies is due to any dilatoriness on the part of the appellant, then that time is not allowed to him. But he is allowed any time occasioned by his opponent, or by anything done in the offices of the Court. The latter case also points out that S. 12 confers a substantive right upon the appellant to claim the time as excluded.

The decisions of this Court, 23 Bom 442[1] and 15 Bom L R 681,[2] mentioned in the reference, have laid it down that if the appellant allows the 20 days limited by Art. 151 to expire without making any application for a copy of the decree, then no time can be claimed for obtaining a copy of the decree. In my opinion there is no justification in the language of the section for imposing such a limitation upon the rights which the section confers upon the appellant. The decisions of this Court really amount to adding to S. 12 a proviso

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1. Yamaji v. Antaji, (1899) 23 Bom 442.
2. New Piece Goods Bazaar Co. v. Jivabhai, (1913) 15 Bom L R 681=20 I C 537.
3. Pramatha Nath Roy v. W. A. Lee, A I R 1922 P C 352=68 I C 900=49 I A 307=49 Cal 999 (P C).
4. Jijibhoy N. Surty v. T. S. Chettyar Firm, A I R 1928 P C 103=109 I C 1=55 I A 161=6 Rang 302 (P C).

that application for copy of the decree has been made before the time limited for appeal by Art. 151 has expired, and the section contains no such proviso. Under the practice existing on the Original Side of this Court it is the application to have the decree drawn up, and not the application for a copy, which starts the procedure which leads to copy being supplied. The practice is for the respondent's attorneys to draft the decree and send the draft to the appellant's attorneys, and if the attorneys agree on the draft, as happened in this case, it is then sent to the Prothonotary, who has the decree drawn up and sealed. In complicated cases it may take some months to settle the terms of the decree, since the draft may pass backwards and forwards many times between the attorneys and there may be applications to the Court for speaking to the minutes. It is difficult to see in such a case what advantage is to be gained by the appellant applying within 20 days from the date of the decree for a copy of the decree, when he well knows that the decree itself is not in existence, and cannot be copied. In cases in the mofussil where the decree is actually, though not always, signed within the time limited for appeal, it may be difficult to prove that the time taken for obtaining a copy was requisite if no application for such copy was made within the time limited. But in my opinion the question whether the time was requisite is always one of fact to be decided in the circumstances of each case. I demur to the theory that the Court can impose upon the statutory right of an appellant a restriction not warranted by the Act. I entertain no doubt that a rule providing that no time shall be allowed for obtaining a copy of the decree unless such copy be applied for within 20 days from the date of the decree would be ultra vires.

The decisions of this Court followed a Full Bench decision of the Allahabad High Court, 12 All 461,[5] and the decisions were followed by the Patna High Court in 6 P L J 350.[6] But a recent Full Bench decision of the Patna High Court, 15 Pat 284,[7] has overruled the case in 6 P L J 350,[6] and disagreed with the view taken by this Court. In a Full Bench decision of the Calcutta High Court, 59 Cal 1215,[8] the view of the Bombay High Court has also been disapproved. In my opinion there is no justification for the limit imposed upon the rights of the appellant under S. 12 by the decisions of this Court. I think that those decisions are inconsistent with the decision of the Privy Council in 55 I A 161,[4] that S. 12 confers a substantive right upon the appellant to the exclusion of the time specified. I am not however prepared to agree with the view which, I understand, the Calcutta High Court took in 59 Cal 1215,[8] namely, that the requisite time for obtaining a copy of the decree in no case begins to run until the decree has been sealed. It is, no doubt, self-evident that a copy cannot be supplied of a decree which does not exist; but it does not follow from this that the time requisite for obtaining a copy does not include time required in drawing up the order. In my opinion, if the time actually required for obtaining a copy of the decree has been increased by the default of the appellant in getting the decree settled, then the time taken for obtaining a copy of the decree was not requisite within the meaning of S. 12. In my opinion, the first question referred should be answered in the affirmative, and the second question, in the negative.

Rangnekar, J.—Having regard to the language of S. 12, Lim. Act, the questions raised are not free from difficulty. I am unable to agree with the view which seems to have been taken by the Calcutta High Court that limitation begins to run from the date of the signing of the decree. Having regard to the fact however that it is difficult to reconcile the decision in 49 I A 307[3] with the Bombay view, I am not prepared to differ from the view taken by the learned Chief Justice. I therefore agree that the questions should be answered in the way proposed in the judgment just delivered.

Kania, J.—I agree that the answers to the two questions should be as proposed in the judgment of the learned Chief Justice. Starting with the decision in 23 Bom 442,[1] the Bombay High Court accepted the view that in order to obtain the benefit of S. 12 (2), Lim. Act, an application for a copy of the decree should be made before the period of limitation prescribed in the schedule to that Act expired. That decision approved of the view taken by the Full Bench of the Allahabad High Court in 12 All 461,[5] which was contrary to the view taken by a Full Bench of the Calcutta High Court in 13 Cal 104.[9] According to the view of the Allahabad High Court, which was thus accepted by this Court, the starting point for the exclusion of time under S. 12 (2), Lim. Act, was the day on which an application for a copy was made to the Court and ended when the copy became ready for the applicant. In 49 I A 307,[3] although the question was not directly considered by the Privy Council, it appears from the judgment that their Lordships agreed with the view of the Calcutta High Court that it was open to the Court to treat the time properly spent in preparing the original decree as requisite for obtaining a copy of the decree. That argument was considered not only in respect of the facts of that case in which the application for a copy was made after the prescribed period of limitation had expired, but also in respect of the time of six days excluded in 13 Cal 104.[9] It was held that the time spent in having the original prepared in 49 I A 307[3] was due to the appellants' laches and therefore was not requisite within the meaning of the section. The six days spent for the decree in 13 Cal 104[9] even before the application for a copy was made, was considered to be properly excluded under that section. Having regard to that view, it is now difficult to accept the correctness of the view taken in 23 Bom 442[1] and the subsequent decisions following the same.

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[5] Bechi v. Ashan-ullah Khan, (1890) 12 All 461 =1890 A W N 149 (F B).

[6] Jyotindranath Sarkar v. Lodna Colliery Co., Ltd., A I R 1921 Pat 175=62 I C 649=6 P L J 350=2 P L T 361 (F B).

[7] Gabriel Christian v. Chandra Mohan Missir, A I R 1936 Pat 45=160 I C 447=15 Pat 284 =16 P L T 849 (F B).

[8] Secy. of State v. Parijat Debee, A I R 1932 Cal 331=137 I C 526=59 Cal 1215=56 C L J 557=36 C W N 469 (F B).

The decision in 49 I A 307[3] came to be considered by a Bench of this Court in 48 Bom 292.[10] I am unable to accept the view there taken that 49 I A 307[3] does not touch the decision or practice of this Court in this respect. After the judgment in 49 I A 307[3] was given, the Allahabad High Court does not appear to have occasion to consider its effect on the Full Bench decision in 12 All 461.[5] In 57 Mad 560,[11] 49 I A 307[3] was distinguished on the ground that it was in respect of a decree on the original side: *see* the observations at p. 568. The Patna High Court which had formerly accepted the Bombay view, in a subsequent Full Bench decision in 15 Pat 284,[7] came to a different conclusion. Under these circumstances and having regard to the uniform view taken by the other High Courts of the effect of 49 I A 307,[3] I think that the view taken by this Court in 23 Bom 442[1] cannot now survive. Having regard to the decision in 49 I A 307,[3] together with the decision in 55 I A 161,[4] the principle laid down in 15 Bom L R 681[2] must not also be considered now as good law.

P.R./D.S. *Answers accordingly.*

A. I. R. 1937 Bombay 165

BROOMFIELD AND SEN, JJ.

Emperor

v.

Don Fillius D'Silva—Accused.

Criminal Ref. No. 99 of 1936, Decided on 7th October 1936, made by Sess. Judge, Thana.

(a) Bombay Municipal Boroughs Act (18 of 1925), S. 167—Existence of nuisance need not be proved by evidence—Still opinion of Chief Officer should be properly proved — Mere production of notice signed by him cannot be said to have proved it.

Under S. 167 of the Act what is required is that the Chief Officer should be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for, if in his opinion a nuisance exists. It is not necessary therefore that it should be proved by evidence that a nuisance exists in fact. It is however necessary that the opinion of the Chief Officer should be properly proved, and that cannot be considered to be sufficiently done by the mere production of a notice signed by the Chief Officer. [P 166 C 1, 2]

(b) Bombay Municipal Boroughs Act (18 of 1925), S. 167—Words 'cover over' and 'fill up'—Applicability—It is uncertain whether they apply to low-lying land on which water accumulates—Power to order levelling of such land is harsh and cannot be said to be conferred by legislature.

The words 'cover over' in S. 167 are not intended to apply to land. It is by no means clear therefore whether they are intended to apply to land on which water accumulates. No doubt, they would properly apply to filling up holes or depressions in a plot of land. It is extremely doubtful whether they would apply or could have been intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low-lying land. The power to order levelling of this kind is on the face of it so harsh and oppressive that one cannot suppose that the Legislature intended to confer this power unless the language of the section is perfectly clear. [P 167 C 1]

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[9] Bani Madhub Mitter v. Matungini Dassi, (1886) 13 Cal 104 (F B).

[10] Macmillan & Co., Ltd. v. K. & J. Cooper, A I R 1924 Bom 185=87 I C 93=48 Bom 292 =25 Bom L R 1309.

[11] Thirumala Reddi v. Anavemareddi, A I R 1934 Mad 306=149 I C 172=57 Mad 560=66 M L J 687 (F B).

(c) Bombay Municipal Boroughs Act (18 of 1925), S. 167—Clause "or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe"—Clause does not empower ordinary levelling of low land on which water accumulates.

The words "or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe" must be considered with their context. Even under this clause it cannot be supposed that the Chief Officer has power to order levelling of a low-lying land on which water accumulates. *24 Bom 125, Rel. on.* [P 167 C 2]

A. G. Desai, *A. A. Adarkar* and *J. F. Ferreria*—for Accused.

W. B. Pradhan—for Complainant.

Broomfield, J.—The question in this case is as to the legality of a conviction under S. 193, Bombay Municipal Boroughs Act 18 of 1925, for failure to comply with a notice issued under S. 167 of the Act. The reference has been made by the Sessions Judge of Thana, in a case in which one Don Fillius D'Silva, has been convicted by the First Class Magistrate of Kurla and sentenced to pay a fine of Rs. 10. The accused owns a plot of land measuring 6,000 sq. yards in the Municipal limits of Kurla. The Chief Officer of the Municipality sent him a notice under S. 167 which was in the following terms:

> Whereas the above tank (low-lying area) belonging to you which is full of stagnant water is a source of nuisance to the surrounding locality inasmuch as it forms a breeding ground for mosquitoes and causes the accumulation of filthy sullage water thus affecting the health and general sanitation of the locality. Now, pursuant to the provisions of S. 167, Bombay Municipal Boroughs Act of 1925, I do hereby require you, within fifteen days from the service hereof, to get the same filled up with dry earth to the level of the surrounding ground.

It appears that the level of the accused's plot of land is two to three feet below that of the surrounding land, and that the filling up of the land so as to bring it on the same level as the surrounding land would cost from 4,000 to 5,000 rupees. The accused says that this is out of all proportion to the value of the land and altogether beyond his resources. It is also contended on behalf of the accused that in any case fifteen days was an insufficient time for doing the work and that there is no evidence that any nuisance was caused by the condition of his land. Under S. 167 of the Act what is required is that the Chief Officer should be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for if in his opinion a nuisance exists. It is not necessary therefore that it should be proved by evidence that a nuisance exists in fact. In so far as the learned Sessions Judge, who has referred the matter, suggests the contrary, we are unable to agree with him. We do however agree that it is necessary that the opinion of the Chief Officer should be properly proved. We do not consider that that is sufficiently done by the mere production of a notice signed by him. There is no other evidence in the case. The Chief Officer did not give evidence and the Sanitary Inspector who was the only witness examined could not and did not say anything about the Chief Officer's opinion. Incidentally I may say that this witness admitted that at the present time, that is, at the time of the trial, there was no complaint from anybody of any nuisance.

Then another point is that in S. 193, under which the accused has been convicted, there is a proviso that when the notice fixes a time within which certain act is to be done, and no time is specified in the Act, it shall rest with the Magistrate to determine whether the time so fixed was reasonable time within the meaning of the Act. The record of the trial is very scanty, but taking it as it is, it seems sufficiently clear that an allowance of fifteen days for raising the level of the whole of the accused's plot by two or three feet was quite unreasonably short. On both these grounds we agree with the learned Sessions Judge that the conviction of the accused ought not to be sustained. The more important question as to whether the Chief Officer has power under S. 167 of the Act to make the order complained of is more difficult. Cl. 1 of S. 167, which is the one with which we are concerned, is as follows:

> (1) If, in the opinion of the Chief Officer, (*a*) any pool, ditch, quarry, hole, excavation, tank, well, pond, drain, water-course, or any collection of water, or (*b*) any cistern or other receptacle for water, whether within or outside a building, or (*c*) any land on which water accumulates and which is situate within a distance of one hundred yards from any building used as a dwelling house, is or is likely to become a breeding place of mosquitoes or in any other respect a nuisance, the Chief Officer may, by notice in writing, require the owner thereof to fill up, cover over or drain off the same in such manner and with such materials as the Chief Officer shall prescribe, or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe.

The first point that arises is, is the land in question a tank? On the evidence we can only hold that it is not. The notice itself suggests really that it is not a tank because it is referred to as "tank (low-lying area)". The prosecution made no attempt to show that it can properly be described as a tank. We must take it therefore that it does not come under Cl. (a), sub-s. 1 of the section. That being so, the case can only come under Cl. (c), and the question is whether, when you are dealing with land on which water accumulates and which is situate within a distance of one hundred yards from any building used as a dwelling house, an order can lawfully be made requiring the whole area of the land to be raised to the level of the neighbouring land. (Incidentally, I may remark that there is no definite evidence on the record to show that this land is within one hundred yards of a dwelling house.)

The section gives power to the Chief Officer to require the owner of the property referred to "to fill up, cover over or drain off" the property. These words refer back without distinction to Cls. (a), (b) and (c). But obviously all the words are not equally appropriate to all that precedes. You can fill up almost all the items in Cl. (a), except a collection of water, but you cannot very well fill up a cistern or receptacle for water, that is to say not in the sense intended. You can cover over most if not all of the things mentioned in Cl. (a), and also those mentioned in Cl. (b), but you cannot cover over land, at any rate, if it is a large plot of land. Obviously the words 'cover over' were not intended to apply to land. The words "drain off" are the only ones which might be appropriate to Cls. (a), (b) and (c) alike. It is by no means clear therefore that the words "fill up" were intended to apply to the land on which water accumulates. No doubt they would properly apply to filling up holes or depressions in a plot of land. It is extremely doubtful whether they would apply or could have been intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low-lying land. The power to order levelling of this kind is on the face of it so harsh and oppressive (or may be so; in this case the area is an acre and a quarter and it might be several acres) that one cannot suppose that the Legislature intended to confer this power unless the language of the section is perfectly clear, and, as I say, I do not think it is. I am not satisfied that the words of this section were intended to give or do give power to make the order which was made in this case. It is true that the section also contains the words,

> or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe.

But I think those words must be considered with their context. It is a case of *noscitur a sociis.* I am not prepared to say that even under that clause power to make such an order is given. I think that this view of the construction of the section derives a certain amount of support from the decision in 24 Bom 125,[1] although that was a case dealing with a different Act. Even supposing that the Chief Officer has power under the strict terms of this section to direct the owner to raise the level of the whole of his land, I consider that the order in the circumstances of his case must be regarded as an arbitrary and oppressive one, and that of course would be an additional ground for holding that the conviction should not be allowed to stand. We set aside the conviction, and direct that the fine if paid be refunded.

S.C./D.S. *Conviction set aside.*

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[1] Municipal Commissioner, Bombay v. Hari Dwarkoji, (1900) 24 Bom 125=1 Bom L R 518.

A. I. R. 1937 Bombay 167

BEAUMONT, C. J.

Jamnadas Vrijlal—Defendant—Applicant.

v.

Chandulal Jamnadas — Plaintiff—Opposite Party.

Civil Revn. No. 164 of 1936, Decided on 11th November 1936, against order of I. C. Munsif, Joint Sub-Judge, Ahmedabad, in Suit No. 1168 of 1931.

(a) Civil P. C. (1908), S. 115—Interlocutory orders—Revision is competent, though High Court should be slow to interfere.

A revision application under S. 115 in respect of interlocutory orders is competent, though the High Court should be very slow to interfere in revisional jurisdiction with orders which are merely interlocutory: *A I R 1932 Bom 81, Disting.*; *A I R 1924 Bom 65, Rel. on.* [P 168 C 2]

(b) Bombay Civil Courts Act (14 of 1869) S. 24—Relief for declaration and injunction valued in plaint at Rs. 230, though subject matter of declaration and injunction worth more than Rs. 5,000 — Subordinate Judge with Second Class powers is competent to entertain suit.

The Suits Valuation Act, like the Bombay Civil Courts Act, deals with valuation of suits for purposes of jurisdiction, and therefore must affect the construction of S. 24, Bombay Civil Courts Act. [P 169 C 1]

Where the relief sought appears to be no more than a declaration and an injunction, and the value of that relief is placed in the plaint at Rs. 230, though the property which is the subject matter of the declaration and injunction is worth over Rs. 5,000, the former amount necessarily governs the value of the subject matter of the suit for purposes of jurisdiction and the Subordinate Judge with Second Class powers is competent to entertain it: *A I R 1932 Bom 111*; *A I R 1920 Bom 105* and *33 Bom 658*, *Rel. on.* [P 169 C 1]

M. R. Jayakar and *B. G. Thakor*—for Applicant.

U. L. Shah—for Opposite Party.

Order.—This is a revision application made by the defendant. The plaintiff, who is a son of the defendant, alleges in the plaint that the defendant is wasting the joint family property and misappropriating it, and he asks in the plaint for a declaration that he is entitled along with the defendant and a cousin to the joint possession, enjoyment and management of the joint family property, and then he asks for injunctions, both prohibitory and mandatory, against the defendant. The claims were valued for the purposes of the Court-fees Act at Rs. 230, but it is admitted by the pleaders on both sides, in a purshis which they signed, that the value of the immoveable and moveable properties in suit is more than Rs. 15,000. The suit was started in the Court of the Second Class Subordinate Judge, and two preliminary issues were raised, the first one, as to whether the plaint was adequately stamped, and secondly whether the Court had pecuniary jurisdiction to try the suit. The learned Judge answered both the preliminary issues in the affirmative. It is contended on this revision application that the answer to the second preliminary issue, which goes to jurisdiction, is wrong, but in the first instance Mr. Shah, on behalf of the respondent, has taken the preliminary objection that no revision application lies under S. 115, Civil P. C., and for that contention he relies particularly on a decision of this Court in 33 Bom L R 1596,[1] where Baker, J. reviewed the authorities. That was a case in which the preliminary issue was one as to res judicata, whereas in the present case the preliminary issue goes to the jurisdiction of the Court, and this Court in 48 Bom 43[2] held that a revision application under S. 115 was competent in respect of a preliminary order passed by a Judge where that preliminary order went to the jurisdiction of the Court. The subject matter of the preliminary issue in that case was whether the Secretary of State was a necessary party, but the basis of the decision was that the preliminary issue involved a consideration of the jurisdiction of the Court.

In my opinion that case was rightly decided, and in any case it binds me. S. 115, Civil P. C., provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. I think that Baker, J. in 33 Bom L R 1596[1] went too far when he held that a finding on an interlocutory matter followed by an order is not a case decided within S. 115. That view would really involve this, that "a case decided" within S. 115 means a case finally decided and that the section has no application to interlocutory orders. The case in 48 Bom 43[2] seems to me inconsistent with that view, and I have myself acted in revision in more than one case in respect of interlocutory orders, although I entirely agree with the caution which has been laid down many times that this Court should be very slow to interfere in its revisional jurisdiction with orders which are merely interlocutory. But, in my view, there is jurisdiction to do so, and the jurisdiction can be exercised in a proper case. I think, therefore, on the authority in 48 Bom 43,[2] I have jurisdiction in this case to deal with the matter in revision.

Now on the merits the contention of the applicant is that under S. 24, Bombay Civil Courts Act, the jurisdiction of a Second Class Subordinate Judge is limited to suits wherein the subject matter does not exceed in amount or value Rs. 5,000, and he says that admittedly here the subject matter of the suit, that is the property which is the subject matter of the suit, exceeds Rs. 5,000. But then one has to read the Bombay Civil Courts Act in conjunction with the Suits Valuation Act of 1887, which again has to be read in conjunction with the Court-fees Act of 1870. S. 7, Cl. iv (c), Court-fees Act, provides that the amount of fee payable under this Act in suits to obtain a declaratory decree or order, where consequential relief is prayed, or (d) an injunction is sought, shall be computed according to the amount at which the relief sought is valued in the plaint. Now here the relief sought appears to be no more than a declaration and an injunction, and the value of that relief is placed in the plaint at Rs. 230, though, no doubt, the property which is the subject matter of the declaration and injunction is worth over Rupees 15,000. Then one comes to S. 8, Suits Valuation Act of 1887, which provides:

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[1] **Senaji Kapurchand v. Pannaji Devichand, A I R 1932 Bom 81=135 I C 815=33 Bom L R 1596.**

[2] **Secy. of State v. Narsibhai Dadabhai, A I R 1924 Bom 65=77 I C 241=48 Bom 43=25 Bom L R 992.**

> Where in suits other than those referred to in the Court-fees Act, 1870, S. 7, Paras. v, vi and ix, and Para. x, Cl. (d) (and this case does not fall within any of those paragraphs), court-fees are payable *ad valorem* under the Court-fees Act, 1870, (and here the Court-fees are payable *ad valorem* under Sch. 1), the value as determinable for the computation for Court-fees and the value for purposes of jurisdiction shall be the same.

No doubt the result is rather startling; but the effect of it seems to be that inasmuch as the plaintiff has valued his relief for declaration and an injunction at Rs. 230, that necessarily governs the value of the subject matter of the suit for the purposes of jurisdiction. I should point out that the preamble to the Suits Valuation Act states that:

> It is expedient to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with respect there to,

so that clearly the Act is dealing with valuation of suits for the purposes of jurisdiction, and therefore must affect the construction of S. 24, Bombay Civil Courts Act, which deals with the same subject. In my opinion therefore the learned Subordinate Judge was right in holding that he had jurisdiction to entertain this suit. The decision seems to me to be in accordance with the view which has been adopted by this Court in a good many cases which were cited to me, particularly 56 Bom 23,[3] 44 Bom 331[4] and 33 Bom 658.[5] The application must be dismissed with costs.

V.B.B./D.S. *Application dismissed.*

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[3] Ishwarappa v. Dhanji Bhanji, A I R 1932 Bom 111=137 I C 702=56 Bom 23=34 Bom L R 44.

[4] Balkrishna Narayan v. Jankibai, A I R 1920 Bom 105=56 I C 340=44 Bom 331=22 Bom L R 289.

[5] Dagdu v. Totaram, (1909) 33 Bom 658=4 I C 242=11 Bom L R 1074.

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BARLEE AND TYABJI, JJ.

Neelawa Dundappa Kohalli—Plaintiff—Appellant.

v.

Gurshiddappa Madiwalappa Pattanshetti and *others*—Defendants — Respondents.

First Appeal No. 92 of 1931, Decided on 14th September 1936, from decision of First Class, Sub-Judge, Bijapur, in Suit No. 678 of 1929.

(a) Hindu Law — Adoption — Evidence — Statements in registered documents immediately after adoption, specifying fact of adoption—Subsequent conduct of parties on basis of fact of adoption — Ceremony of adoption being very simple, fact of adoption must be taken as proved.

Where there are immediately after the alleged adoption statements in registered documents to the effect that the adoption had taken place, and the subsequent conduct of the parties on the same basis, the actual ceremony of adoption being so simple that it cannot be assumed that in spite of a desire to adopt there should have been any difficulty in going through the ceremony, the fact that adoption did take place must be taken as proved. [P 170 C 2]

(b) Hindu Law—Excommunication—Effect of—Excommunication from caste affecting civil rights for certain acts and events — Civil Court cannot recognize such legal consequence unless it is recognized by law or custom governing parties—Person exercising authority of excommunication must occupy special status or dignity — Excommunication must be for specified events or misconduct of specified class or gravity which must be proved in proceedings not opposed to natural justice.

If the parties whose civil rights are alleged to be deleteriously affected by their excommunication from the caste for certain actions or events, the civil Court cannot recognize such alleged legal consequences unless it is established that the law or custom by which the party in question is governed recognizes that his original status was capable of being subjected to such "diminution of status" by an act that is called excommunication, emanating from some third person. Where such authority of excommunication is recognized at all, it must be exercised by some persons occupying some special status or dignity; and the authority must be exercised on the happening of certain specified events, or misconduct of a specified class and gravity. The existence of such misconduct must be proved in the course of proceedings not entirely opposed to natural justice. [P 171 C 2]

(c) Hindu Law — Adoption — Validity — Shudras—Excommunication of Shudra from caste by head priest for offence of not holding social intercourse with village priest — Excommunication to continue till social intercourse is resumed by him — Son of such person given in adoption — Degradation depends for its degree upon gravity of offence — Most heinous form of degradation only is punishable by expulsion from caste—Excommunication not being for grave offence held did not prevent giving in adoption son of such person.

Under Hindu law degradation depends for its degree upon the gravity of the offence by reason of which it is brought about. It is only the most heinous form of degradation that is stated to be punishable by expulsion from caste. When degradation of such a degree had been incurred, the person may be expelled from the caste and if so expelled he is considered to be dead. [P 172 C 1]

A Hindu Shudra was excommunicated from his caste by a document issued by the head priest for the offence of not holding social intercourse with a village priest, but it was stated in the document that the excommunication could be put an end to on the said person resuming social intercourse with the said priest. The son of such person was given in adoption and on the adoption being challenged :

Held : that the excommunication of the person named in the document could not affect the capacity of the son of such a person in respect of being given in adoption. [P 172 C 2]

Held also : that the excommunication itself was not in such terms as to fall within the higher grade of excommunication inasmuch as by a mere resumption of social intercourse by the excommunicated person with the priest, it could be put an end to. The excommunication, therefore, could not have the grave effect in regard to civil rights of preventing the son of such a person from being given in adoption: *25 Bom 551, Rel. on.* [P 172 C 2]

R. A. Jahagirdar—for Appellant.

H. B. Gumaste — for Respondents 1 and 3.

Tyabji, J. — The present appeal arises out of the affairs of the family of one Madivalappa, who died of plague on 7th February 1916. He left behind him his widow, Gangawa (since deceased), and three daughters, Neelawa, Irawa and Sayawa. The first of these is the plaintiff; the second and the third daughters are defendants 5 and 6. The main object of the suit is to have it declared that an adoption purported to have been made by the widow Gangawa, on 7th July 1919, was invalid and of no effect ; so that the inheritance of Madivalappa must lie with his daughters and not with defendant 1, who is alleged to have been adopted as his son. The first objection that has been taken to the adoption of a son by Gangawa to her deceased husband, is that she was an unchaste wife and must therefore be taken as disqualified to adopt. There is a certain amount of evidence, and a good deal of suspicion cast as to the chastity of Gangawa ; but the evidence is not sufficient to establish and the indications are rather contrary to the allegation that Gangawa was unchaste during the lifetime of her husband. The learned trial Judge has not accepted the evidence that Gangawa was unchaste at all. In any case we think there was no satisfactory evidence that she was unchaste during the lifetime of her husband.

In these circumstances we have to consider whether she had, as a matter of fact, made the adoption. There is a good deal of evidence on this allegation. There are two facts however that seem to take the factum of the adoption beyond dispute. At the very time when the adoption is said to have taken place, four deeds, Exs. 53, 47 49 and 48, were executed. In each of these the adoption is stated as a fact accomplished. The first is the deed of adoption. The others are transfers, one by way of sale and two of gift, in favour of the plaintiff and defendants 2, 5 and 6. All these documents are registered. The second fact is that Ex. 56, a sale deed executed by the plaintiff herself, proceeds on the basis of the adoption having taken place, and of defendant 1, as an adopted son of his father, having made the gift to her under Ex. 48, so that there are, immediately after the alleged adoption, statements in registered documents to the effect that the adoption had taken place and subsequent conduct on the same basis. The actual ceremony of adoption is so simple that it cannot be assumed that in spite of a desire to adopt there should have been any difficulty in going through the ceremony. It must therefore be accepted that the adoption did take place. Then it has to be considered whether the adoption was invalid, because the father and the alleged adopted son had been outcasted by a document, Ex. 38. It was argued that as the alleged adopted son was an outcaste altogether from the Hindu religion, the case did not come within such authorities as 46 All 637,[1] which refer to the adoption of a person belonging to a different sub-caste of the same caste, and not to the adoption of a person belonging to a different caste altogether ; that admitting that a person who belongs to a different sub-caste may be validly adopted, that principle cannot aid the adoption of one who is entirely out of caste and therefore must be considered as not being a Hindu at all.

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[1] Shib Deo Misra v. Ram Prasad, A I R 1925 All 79=87 I C 938=46 All 637=22 A L J 690.

For the purpose of this argument attention must first be paid to the events that are alleged to have inflicted this entire loss of caste and religion upon the son that was adopted. The excommunication is, as I have said, contained in Ex. 38. That document purports to emanate from the Holy Head-priest "(Charwarya Sannidhi) of the Holy seat of Authority of Jagatguru Hire-Char Pattadhakaya of Shri Mad-veershaiva Lingayat community of Shri Maha Ujaini Saddharma Sinhasana," and to be addressed to "the obedient members of the Veer-shaiva Mandal, such as Mathasthas (priest heads), patils and merchants, rich persons, Pujaris and Bhandaris, etc., of the said village of Bijjargi in Taluka Bijapur in the District of Bijapur." It is recited that a complaint had been received from the village priest Gurubalayya, father Chanbasayya Mathapathi against four named persons, one of whom was Onkareppa Patanshetti, the father of the alleged adopted son. The complaint charged the said four persons with the offence of not holding social intercourse with "the said Ayya" (priest)—apparently the village priest who made the complaint—and thereby belittling the cause of religion. It is also narrated that an inquiry had been made on the spot in respect of the complaint, and that the said four persons made false statements. Then the conclusion is stated that the said four persons had transgressed the religion by disobeying the said Ganaghari, that they were the roots of increasing communal enmity and thus they were disobeying the orders of the head of religion. The operative part purports to issue "commands"—"such an order of excommunication has been passed since they dishonoured the order of Gurumuni"—in these terms, viz., that :

> (1) Mathastas, Mathapatis and other devotees of the Veershaiva creed should not go to these four persons and perform any ceremony, etc., of theirs ; (2) this order should be carried out by the Lingayat people ; (3) persons failing to carry out this order will be excommunicated either from Jungamsthan or from Veershaiva community ; and (4) until the said point has been cleared up, intercourse with the said persons has been prohibited.

It is said that a total excommunication from the Hindu religion resulted, so that not only is the father of defendant 1 who is named in the document entirely excommunicated, but defendant 1 is subjected to the disqualifications arising from the excommunication of his father to such an extent that he cannot be validly adopted. The position thus taken up is that certain events have taken place, which, it is said, deleteriously affect the civil rights in question before us. Those alleged events consist in the present case of the commission of an offence by the father of the person whose status is in question before us. The offence consisted of not holding social intercourse with the village priest, and of being the roots of increasing communal enmity, and thus disobeying the orders of the head of the religion. It was followed by excommunication. No evidence of any religious degradation as such is adduced. The allegation is that the excommunication necessarily gives rise to the civil disabilities in question, that defendant 1 who could otherwise have been adopted suffered a loss or change of status by which he became disqualified for adoption. In such cases the parties whose civil rights are alleged to be deleteriously affected are entitled to fuller particulars of the alleged events and actions, and the civil Court cannot recognize such alleged legal consequences unless it is established that the law or custom, by which the party in question is governed, recognizes that his original status was capable of being subjected to such "diminution of status" (*cf.* Dig. 49, 15 sq.) by an act that is called excommunication emanating from some third persons. It is not unreasonable to presume that where such authority is recognized at all, it must be exercised by some person occupying some special status or dignity ; that the authority must be exercised on the happening of certain specified events, or misconduct of a specified class and gravity : and that the existence of such misconduct must be proved in the course of proceedings not entirely opposed to natural justice.

There is no reliable evidence to show the exact meaning and effect of excommunication in the law governing the parties. It is not shown that any dignitary having the power to inflict such a loss of status by purporting to excommunicate, is recognized by the law governing defendant 1 and his father. No materials that we can accept have been adduced to show whether if any dignitary was recognized as having such authority; then the acts relied upon were the acts of the person entitled to hold that dignity; nor whether the preliminary conditions existed which were necessary for the exercise of the authority to excommunicate (assuming any person had such authority); nor whether the proper procedure laid down for exercising that authority was followed. It seems to have been considered by the plaintiff that the responsibility of proving all these facts and of establishing the legal position involved was discharged by proving Ex. 38. In this connexion the following observations in Golapchandra Sarkar Shastri's Hindu Law of Adoption, 2nd Edition (1916), p. 203, seem pertinent:

> According to the sages, commission of certain offences involves degradation which is of three degrees in proportion to the gravity or enormity of the misconduct, namely, *maha pataka* or worst degradation, *anu-pataka* or lesser degradation, and *upa-pataka* or slight degradation. *Maha-pataka* or worst degradation is punishable by expulsion from caste; and the offender is considered to be dead, and Hindu law directs the performance of exequial ceremonies for him, as if he were naturally so.

A little later the learned author proceeds to say:

> As regular excommunication is not found at the present day, and as persons who might be outcasted are not liable to be deprived of their civil rights, the question of their capacity to adopt is not expected to arise. Nor can there be any valid objection to their adopting sons: the exclusion from the communion of the Hindu religion cannot incapacitate them, any more than the Jainas, for affiliating sons.

From this it would appear that "according to the sages" degradation depends for its degree upon the gravity of the offence by reason of which it is brought about. It is only the most heinous form of degradation that is stated to be punishable by expulsion from caste. When degradation of such a degree has been incurred, the person may be expelled from the caste, and if so expelled he is considered to be dead. Accepting this statement for the present, and we have nothing to show that it is not sufficiently accurate for the present purposes, the argument on behalf of the appellant cannot succeed unless we hold that there has been in the first place a degradation in the most heinous form, secondly, an expulsion from the caste, thirdly, that not only are the four named persons so expelled, but that defendant 1 must also be considered to be degraded and expelled from the caste, and to be placed on the same footing as his father, because his father's name is included in the document. In any case, and taking the least favourable view that is possible to take, the document by which excommunication is said to be brought about must, in view of the considerations to which I alluded at the start, be strictly scrutinized and construed. Turning to it, it is sufficient for the present purposes to advert to two circumstances that appear from the terms of Ex. 38 itself. In the first place only the four named persons are subjected to the terms of the document; and assuming that its terms must be deemed to make the persons named out-castes, it cannot be assumed that the excommunication must affect the capacity of the sons of the persons named in respect of being given in adoption.

The decision in 25 Bom 551[2] seems directly applicable. There, a Hindu father had adopted Islam. There cannot be a more emphatic way of becoming a non-Hindu, of the ties with Hindusim being severed, than the adoption of another religion like Islam. Consequently the father in that case had certainly by his own act brought about as unequivocal an excommunication of himself from the Hindu religion as can be considered to have happened in the case of a person excommunicated by such a document as Ex. 38; and yet the son of that father was considered eligible for being adopted. Secondly, the excommunication itself is not in such terms as to fall within the higher grade of excommunication. In terms it is only an excommunication "until the said point has been cleared up". So that apparently by a mere resumption of social intercourse with the Ayya referred to in the document, the excommunication could be put an end to. It may therefore be taken that it cannot have the grave effect, in regard to civil rights, of preventing the son of the person excommunicated from being given in adoption. In these circumstances there was no such obstruction to the adoption of defendant 1 as the civil Courts can recognize, and the decision arrived at by the learned Judge cannot be disturbed. I would dismiss the appeal with costs.

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[2] **Shamsing v. Santabai, (1901) 25 Bom 551=3 Bom L R 89.**

Barlee, J.—I agree. The document, Ex. 38, is no doubt a sentence of excommunication. Whilst conceding this, I do not think that it would be fair to extend it beyond the persons actually named, in view of the extreme disproportion between the offence and the punishment. I agree, therefore, that, though the father was excommunicated, the son still remained within the caste. There was, therefore, no objection to his being adopted, and since an adoption involves no religious ceremony, I cannot say that there was any objection to the validity of his adoption on the ground that his father was not capable of giving him in adoption. Possibly the adopting mother made herself liable in her turn to be excommunicated, since she had disobeyed the order of the head-priest by having any dealings with the father. But this is another matter with which we are not now concerned. In my opinion, the decision of the Subordinate Judge is corrcct, and the appeal must be dismissed with costs.

W.D./A.L. *Appeal dismissed.*

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RANGNEKAR, J.

Shivappa Dhondappa Biradar and *others*—Defendants—Appellants.

v.

Ramlingappa Shivappa Biradar — Plaintiff—Respondent.

First Appeal No. 269 of 1934, Decided on 27th August 1936, against decision of First Class Sub-Judge, Bijapur, in Darkhast No. 506 of 1932.

(a) Civil P. C. (1908), S. 144—Applicability —S. 144 applies when decree is varied or reversed in same proceedings between parties whether by appeal, review or otherwise—It does not apply when decree is varied or reversed in another unconnected suit—Application for restitution under S. 144 cannot be granted in such later case.

The party seeking restitution under S. 144 must show that there was a decree in consequence of which some party to the record had obtained a benefit to the detriment of the applicant and secondly, that that decree having been reversed or varied, the applicant is entitled to be restored to the position in which he would have been, but for the decree which ultimately has been declared erroneous. The reversal or variation of the decree must be in the same proceedings between the parties—it may be as the result of a successful appeal or an application for review or in any other manner provided for by the Code—and that the decree must be between the parties to the record and the reversal or modification of it must be in favour of the party applying or someone claiming under him. But if in some other suit not connected with the suit in which the application for restitution is made, the decree under which a party has been deprived of property or other benefit is set aside, the section cannot apply: *A I R 1922 P C 269, Expl.*[P 174 C 2; P 175 C 1]

(b) Inherent Power—Redress of wrong to party—Ample and specific statutory remedies provided for such redress—Wrong cannot be redressed by Court under its inherent jurisdiction.

When the law of the land has provided ample specific remedies—statutory or otherwise—for the redress of a wrong suffered by a party owing to the conduct of his opponent or the mistakes committed by the Court, a party is not entitled to invoke, and the Court ought not to exercise the inherent jurisdiction of the Court. [P 176 C 1]

(c) Jurisdiction—Civil Court—Partition suit —Agricultural land — Collector directed to make partition in terms of decree—Collector acting contrary to such directions in decree —Civil Court has jurisdiction to set aside or modify the partition effected by Collector.

Where in a partition suit a preliminary decree is passed and the subject matter of suit being land paying revenue to Government is sent to the Collector asking him to make partition in terms of the decree and the Collector disregarding the directions in the decree makes a partition, the civil Court has jurisdiction to set aside in toto or modify the partition effected by the Collector: *A I R 1926 Bom 258, Foll.* [P 176 C 1]

R. A. Jahagirdar—for Appellants.

H. B. Gumaste—for Respondent 1.

Judgment.—The facts in this case are somewhat complicated but, so far as they are material, may be shortly stated as follows:

Ramlingappa and Somanna were members of a joint Hindu family and possessed 11 lands as joint family property. Somanna alienated 8 out of these 11 lands to various persons including the present appellants. Ramlingappa then brought a suit for partition against Somanna and his alienees. This was suit No. 347 of 1919. The alienees claimed that in effecting partition the equities between the parties should be adjusted, and as far as possible the lands sold to them and in their possession should be allotted to the share of their alienor Somanna. In September 1921 a preliminary decree for partition was made, which inter alia directed that as far as possible the lands alienated and in the possession of the alienees should be allotted to the share of Somanna. Two days thereafter Somanna sold the remaining three lands to one Sabu, who was his brother-in-law. The latter brought a suit against Somanna for partition and possession of these lands. This was Suit No. 332 of 1924. Appellant 2 in the present appeal, who was defendant 10 in suit No. 347 of 1919, applied in Sabu's suit to be made a party. The application was rejected, and apparently no further steps were taken by him. Sabu obtained a decree for partition. Before this, however, Ramlingappa, who is respondent 1 here, filed a darkhast to carry out the partition decree made in suit No. 347 of 1919. As the lands were assessable to Government revenue, the decree was sent to the Collector to effect a partition. The Collector found that as all the lands had been alienated by Somanna, it was not possible to give effect to the direction contained in the decree to effect partition in such a manner as to allot to the share of Somanna the lands in the possession of his alienees. Therefore, the Collector divided the lands equally between Somanna and Ramlingappa. This happened in March 1926. In August 1926, the Court made a final decree for partition in suit No. 347. Appellant 2 then brought a suit in 1925, being suit No. 219 of 1925, to set aside the decree in suit No. 332 of 1924 against Sabu. The record is not clear whether Somanna was a party to it, but it is not disputed that Ramlingappa was not a party to this suit. This suit came up to the High Court in second appeal and was remanded for disposal according to law. The judgment of the High Court is reported in 33 Bom L R 141.[1] On remand the decree in suit No. 332 of 1924 was set aside. It was after this that defendant 10 filed a darkhast in suit No. 347, which has given rise to the present appeal. The object of the darkhast was to obtain restitution by a fresh partition so as to carry out the direction contained in the decree in suit No. 347 as to the equities in favour of the alienees. The main prayer was that the partition should be so effected that the lands alienated to the alienees should be allotted to the share of Somanna by way of restitution under S. 144, Civil P. C. The learned First Class Subordinate Judge rejected the application as he held that the application for restitution was not competent under S. 144; and it is from that decision that the present appeal is taken.

Mr. Jahagirdar, who has argued this case exhaustively, contends that the learned Judge was wrong in rejecting the application. He says that the section does not say that restitution should be made if the decree, under which some benefit has been taken by a party to the suit, is varied or reversed on appeal from that decree, and the section contemplates a case like the present one where in effect the decree made has been set aside in other proceedings as in this case. He further says that, assuming the application was incompetent under S. 144 of the Code, the Court could have entertained it under its inherent jurisdiction; and lastly he says that, in any event, the application was competent under S. 47, Civil P. C. He relies upon several cases in support of his argument, but he concedes that in terms S. 144 was inapplicable. S. 144, Civil P. C., provides that:

> (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

It seems to me to be perfectly plain upon the language of this section that the party coming under the section has to show that there was a decree in consequence of which some party to the record had obtained a benefit to the detriment of the applicant; and, secondly, that that decree having been varied or reversed, the applicant is entitled to be restored to the position in which he would have been, but for the decree which ultimately has been declared to be erroneous. It is also clear that the reversal or variation of the decree must be in the same proceeding between the parties—it may be as the result of a successful appeal or an application for review or in any other manner provided for by the Code,—and it is also clear that the decree must be between the parties to the record and the reversal or modification of it must be in favour of the party applying or some one claiming under him. Upon the plain meaning of the section, therefore, I am clearly of opinion that it is impossible to hold that, if in some other suit not connected with the suit in which the application for restitution is made, the decree under which a party has been deprived of property or other benefit is set aside, the section can apply. Nor is there any authority, which is produced before me, to support a contrary view.

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[1] Gurlingappa v. Sabu, A I R 1931 Bom 218=131 I C 886=33 Bom L R 141.

Mr. Jahagirdar, however, relies upon 49 I A 351,[2] for the purpose of showing that their Lordships of the Privy Council have laid down that S. 144 should be liberally construed. I should have thought that no authority was necessary for this purpose. The one undisputed principle of law is that no man should suffer by the act of the Court; and if the Court finds as the result of its act some party has received some benefit or advantage, and that act is set aside or modified by a superior Court finally, then the Court has and must have the power of putting the successful party in the same position in which he would have been, but for what has turned out to be a wrongful act of the Court; and that exactly is the principle of S. 144 and the object of it.

In the Privy Council case, the facts were that an execution sale of immoveable property, which took place in 1904, and the certificate of sale, were set aside by the Privy Council in 1913, reversing the judgment of the High Court at Calcutta. The auction-purchasers had been in possession since February 1905, and the price paid by them into Court on the issue of the sale certificate had been distributed to the holders of the decrees against the judgment-debtor. So, when the sale was set aside, the auction-purchasers clearly became entitled to restitution. The sale had taken place under an order of the Court. The auction-purchasers had purchased the property and paid consideration for it. The sale had been set aside by the Privy Council, and clearly the auction-purchasers became entitled to restitution. Upon these facts their Lordships held that the case came under S. 144, Civil P. C. Mr. Jahagirdar, however, relies on the remarks of their Lordships at pp. 355-356 where they observed as follows:

> It is the duty of the Court under S. 144, Civil P. C., to 'place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed.' Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L. C. in (1871) 3 P C 465,[3] at p. 475: "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court,' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case." The auction-purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment-debtor who had attached the unincumbered property in question and could have realized their judgment debts by a sale of this property in execution, and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.

In the case to which their Lordships refer it was pointed out by the Judicial Committee that a Court of appeal, when it reverses a judgment of a subordinate Court, has an inherent jurisdiction to order restitution of everything, which may have been improperly taken because taken in execution of a decree. It is important to notice that both these cases were cases where in the one, an order of sale made was set aside by the same Court between the same parties and the auction-purchasers in execution of the decree, and in the other, the decree was set aside in appeal. There is nothing in the judgments to support, except the remark as to inherent jurisdiction, the contention that if a decree has been set aside by a decree in a different suit between some of the parties to the first decree and strangers, an application for restitution would lie under S. 144. Undoubtedly their Lordships observed that S. 144 should be construed liberally, and in that case their Lordships did construe it liberally, because S. 144 in terms refers only to a "decree varied or reversed". An order for sale in execution proceedings or for the issue of a certificate cannot amount to a decree. Literally, therefore, such an order would not lie under S. 144. To that extent their Lordships of the Privy Council observed that the Section should be construed liberally, and the effect be given to it for the purpose of restitution. But the point to note is that the orders originally made were set aside in the same suit and execution proceedings, and between the same parties and not at all, as in the present case, where the original decree or the partition effected thereunder was not set aside in the same suit. Therefore, the learned advocate was driven to contend that the application for restitution was competent under the inherent jurisdiction of the Court. When the law of the land has provided ample specific remedies—statutory or otherwise—for the redress of a wrong suffered by a party owing to the conduct of his opponent or the mistakes committed by the Court, a party is not entitled to invoke, and the Court ought not to exercise, the inherent jurisdiction of the Court. I need not refer to the authorities on this point.

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[2] Jai Berham v. Kedar Nath Marwari, A I R 1922 P C 269=69 I C 278 = 49 I A 351 = 2 Pat 10 (P C).

[3] Rodger v. Comptoir d'Escompte de Paris, (1871) 3 P C 465=40 L J P C 1=24 L T 111 =19 W R 449=7 Moo P C (N S) 314.

In this case the position was perfectly simple. When the Collector effected partition, as the appellant contends, in defiance of or ignoring the specific direction given by the preliminary decree to observe equities in effecting partition, it was open to the party aggrieved by such partition to come to the Court and complain of it and have the partition modified or set aside; and it is clear that in such a case the Court would have jurisdiction to interfere if a proper case was made out in support of the complaint. Where the Collector carries out a decree and effects partition in conformity with the decree, it is not open to the civil Courts to revise his acts or to interfere in the partition effected by him; but it is equally clear that where the Collector acts contrary to the decree, the Courts will have—and, if I may humbly say, ought to have—jurisdiction to interfere either to set aside in toto or to modify the partition effected by the Collector; and in that respect I respectfully agree with the decision of Sir Norman Macleod, C. J., in 28 Bom L R 523.[4] There the learned Chief Justice held that, where the Collector once effects a partition in accordance with the decree, it is not competent to the Court to refer the case back to him for re-partition; but if the Collector disregards the terms of the decree and divides the property in contravention of its terms, the Court is entitled to refer the case back to the Collector to partition the property in accordance with the terms of the decree; and that the Collector must follow the terms of the decree. Therefore, it was open to the appellant to complain of the partition effected by the Collector.

If the complaint had been rejected and a final decree made ordering possession, it was open to the party aggrieved to appeal against it. But this course was not followed by the appellant, nor the remedy adopted. It is said by Mr. Jahagirdar that he could not have removed the obstruction caused by Sabu in execution of his decree except by a suit against him, and it was necessary for him, therefore, to bring a suit. I do not agree with him that that was the only remedy which he had to take; and it is difficult to see why he could not have made an application to the Court under S. 47, Civil P. C., under the darkhast which was being executed. But if it was found necessary to bring a suit, then he could have asked the Court to stay its hand before making the final decree, or, having filed his appeal from the final decree, he could have asked for stay of further proceedings and even asked for the stay of the appeal pending the suit which he either had filed or was contemplating to file against Sabu; and I have no doubt that if this course had been adopted, his position would have been perfectly safeguarded, of course on proper terms and subject to proper conditions. It is difficult in these circumstances, therefore, to accept the contention made in view of the facts to which I have referred. The last contention that the application could be entertained under S. 47 has not been very seriously pressed, —and properly— because the answer would be that the decree was completely executed and nothing more remained by way of executing the decree when the so-called application for restitution was made. Having regard to the conclusion to which I have come, I do not propose to discuss the other cases to which the learned advocate has referred. It seems to me to be clear that each of them proceeds on its own facts, and none of them goes to the extent to which Mr. Jahagirdar wants me to go. The appeal, therefore, fails and must be dismissed with costs.

K.B./A.L. *Appeal dismissed.*

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[4] Timmanna v. Govind, A I R 1926 Bom 258=94 I C 656=28 Bom L R 523.

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BARLEE AND TYABJI, JJ.

Manaklal Hirabhai and *others*—Appellants.

v.

Land Acquisition Officer, West Khandesh—Respondent.

First Appeal No. 115 of 1930, Decided on 3rd September 1936, from decision of Dist. Judge, West Khandesh, in Misc. Applns. Nos. 22-24 of 1929.

Land Acquisition Act (1894), S. 6 — Building sites—Compulsory acquisition for widening streets — Municipality under S. 96 (2), Bombay District Municipal Act, cannot refuse permission to build on building sites and apparently render them valueless—For acquisition of building site compensation must be awarded on footing of building sites.

The Municipality as a public body is under the necessity not to exercise its authority in a capricious, wanton, oppressive, arbitrary or tyrannical manner even when acting within the defined limits of its powers. It must use even its admitted powers considerately, with a discretion suitable to the nature and importance of the duties to be discharged, and with a fair and honest judgment. Secondly, under the Act the Municipality has been given no power to refuse in general terms permission to build. It has only power to impose conditions with reference to the location of the building in relation to any street existing or projected. Thirdly, even such conditions cannot be so imposed as to contravene the provisions for compensation when a regular line of street is prescribed. The result is that the Municipality may for consideration acquire the right to prevent the owners of land adjoining a street from building on such parts of the land as it desires to add to the street; but the Municipality is not entitled to prevent building sites being built upon without compensating the owners. In other words, the Municipality cannot prevent a building site from being used for building and apparently render the same valueless. For acquiring building sites, compensation must be paid on the footing of building sites : *Case law referred.* [P 179 C 2; P 180 C 1]

P. V. Nijsure—for Appellants.

B. G. Rao (Asst. Govt. Pleader) — for Respondent.

Tyabji, J.—On 6th December 1928, a notification under the Land Acquisition Act, 1894, S. 6, was issued with reference to the acquisition of three plots of land by the Municipality of Nandurbar for widening a street at Nandurbar. The present appeals refer to two out of the three plots, City Survey Nos. 2171 and 2169, having areas of 36-17/24 square feet and 22-21/24 square feet respectively. The Land Acquisition Officer valued these sites at Re. 1 per square foot and awarded for them Rs. 45-10-0 and Rs. 28-2-0 respectively. On appeal, the learned District Judge held that the claimants were entitled to Rs. 2-8-0 per square foot. He awarded Rs. 4 for the plinth in City Survey No. 2171, i. e. Rs. 131-11-6 in all. In respect of this plot an additional claim of Rs. 864-4-6 is made in appeal here. With reference to the other plot, viz. 2169, the net amount allowed was Rs. 96-1-6 and the claim in appeal is an additional Rs. 503-14-6. The case of the two appellants stands on the same footing and the judgment under appeal has proceeded on a common footing. The two appeals may accordingly be dealt with together. The learned Judge states at the start:

> The sites in question are situated at a junction of four roads. The vegetable market meets there, and there is a chance of more customers being attracted. But the shops on these sites were of very small areas. They were never used for selling attractive and valuable goods. They were used either as tailor's shops or for selling bidis (country cigarettes). It cannot be denied that after the fire of 1924 the more important shops on this Bazzar Road, viz. shops of cloth, gold and silver, shifted to other localities, viz., the Marwari Chowk, at some distance towards the north of the sites in question. Some other new shops are stated to have been opened in Tup Bazzar and Mangal Bazzar towards the north-east. Though almost all the buildings which were burnt by fire have been reconstructed and used as shops there was a cry for reduction of Municipal taxes of some shops on the Bazzar Road and taxes were accordingly reduced in four cases. It is also an admitted fact that rents of buildings in the Marwari Chowk locality are increasing. These facts go to show that the Old Bazzar has been depreciating in importance after the fire.

The learned Judge then proceeds to remark :

> The Municipality wants to acquire the sites for widening the roads. With this object it was refusing permission to build over small sites abutting on the existing narrow roads after the old buildings had been destroyed by the fire and it was perfectly within its rights in doing so. The applicants cannot expect to have buildings on these sites. The selling price of some sites during the last four to ten years, as disclosed in the evidence for the applicants, cannot afford any test for valuation in the present case. Similarly, the old rates of rents for these sites or the present rents of the new shops near about cannot afford any basis for valuation in these changed circumstances. After the fire the sites have practically not fetched any rent and have lost all value. The claims, even as reduced by the applicants at the hearing, are very fabulous and it is not possible to value these small sites by comparing them with the sites which could be covered over by buildings.

In a subsequent paragraph he observes in the same strain :

> It cannot be said that the methods adopted by the Municipality in refusing permission to build over such small sites were compulsive and coercive. A public body whose object is to take care of the general sanitation and other conveniences of the whole town has to adopt measures which may seem to be harsh to individuals. On the contrary the evidence adduced goes to show that the public (whose representatives form the municipal body) have co-operated with it by accepting reasonable amounts of compensation at even one rupee per square foot for small open sites abutting on the road and therefore required for its widening.

In short, the learned Judge proceeded on the basis that the Municipality had a right to refuse permission to build upon lands, which the Municipality intended to acquire. By this means, according to the learned Judge and the arguments addressed to us, the Municipality could prevent building sites from being used for building and apparently render them valueless. Then, subsequently, a notification could be issued for their acquisition. The sites would in such circumstances be valued, it is said, on the basis that they could not be built upon because the Municipality refused permission to build. These propositions seem startling enough. The learned Assistant Government Pleader contended, however, that the Bombay District Municipal Act (Bom. 3 of 1901) permitted to the Municipality these methods of compulsory acquisition at little or no cost. He relied for this argument on sub-s. (2), S. 96 of the Act. Under that sub-section the Municipality could, he said, in general terms, refuse permission to the owners of land to build thereon; and could render the land incapable of being built upon and in that manner reduce its value, or indeed render the land valueless. He also argued that the Municipality was expected to do so apparently in the public interest. The powers of the Municipality under the Bombay District Municipal Act are (as will appear from what I shall presently state) far from being unrestricted. But in view of the extravagant claims put forward on behalf of the Municipality it is desirable to draw attention to the observations of West, J., who had to deal with a section (Bom. Act 6 of 1873, S. 33) under which the power to refuse permission to carry out certain works was (unlike the provisions of the District Municipal Act) perfectly general in its terms. In 12 Bom 490,[1] West, J. says (pp. 494-95):

> It does not follow that the Commissioners could, therefore, exercise the authority thus given to them in a capricious, wanton, and oppressive manner. Public authorities, even acting within the defined limits of their powers, must not conduct themselves arbitrarily or tyrannically . . . A public body must keep within its powers, and must use them considerately: *see* per Lord Blackburn in (1878) 3 A C 430,[2] but so acting it is safe: (1881) 7 Q B D 418.[3] There is a further principle of great importance laid down by Lord Selborne, L. C., in (1874) 9 Ch 120.[4] His Lordship says: 'It seems to me that the legislature, in authorizing the School Board, for important public purposes, to exercise these large powers . . . meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them.' The late Sir G. Jessel, M. R., citing this dictum in (1875) 20 Eq 353,[5] at p. 358, adds that 'the public body . . . are to be the judges, subject to this, that if they are manifestly abusing their powers . . . the Court will say it is not a fair and honest judgment, and will not allow it.' These cases define with clearness what discretion a public body may use and at what point the interference of the Courts is justifiable.

In the teeth of these principles, supported as they are by decisions which add weight even to a pronouncement by West, J., it is a bold position to take up that the Municipality may oppressively and tyrannically utilize its powers—however wide or however restricted they may be—for the purpose of rendering valueless lands which the Municipality may hereafter decide to acquire. In our opinion, however, the Bombay District Municipal Act does not give any powers that can in terms be used in this manner. S. 96 (2), which is primarily relied upon, gives three specified options:

(1) The Municipality may give permission to erect, alter, add to or reconstruct the building according to the plan and information furnished [viz., the plan and information furnished under S. 96 (1) (b), under which clause, the plan must show the level stated therein, and furnish information with reference to the matters particularized in the clause]; or

(2) It may impose in writing certain defined classes of conditions: these conditions must refer either: (a) to level, drainage, sanitation, materials, or (b) to the dimensions and cubical contents of

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[1] **Nagar Valab Narsi v. Municipality of Dhandhuka, (1887) 12 Bom 490.**

[2] **Geddis v. Proprietors of Bann Reservoir, (1878) 3 A C 430.**

[3] **Dixon v. Metropolitan Board of Works, (1881) 7 Q B D 418=50 L J Q B 772=45 L T 312=30 W R 83=46 J P 4.**

[4] **Clark v. School Board for London, (1874) 9 Ch 120=43 L J Ch 421=29 L T 903=22 W R 354.**

[5] **Duke of Bedford v. Dawson, (1875) 20 Eq 353=44 L J Ch 549=33 L T 156.**

rooms, doors, windows and apertures for ventilation, or (c) to the number of storeys to be erected, or (d) with reference to the location of the building in relation to any street, existing or projected, for the purpose for which the building is to be used; or,

(3) it may direct that the work shall not be proceeded with unless and until all questions of a certain kind have been decided to their satisfaction: these questions must be connected with the respective location of the building and any such street.

None of these alternatives permit the Municipality to refuse in general terms permission to build. All that they permit is to impose conditions of special classes, or to direct that the work shall not be proceeded with until questions relating to the location of the building have been decided to their satisfaction. Nor are these the only limitations upon the powers of the Municipality in regard to granting permission to build. There are further limitations which are illustrated by a criminal case: 36 Bom L R 217.[6] It was held there, that the Municipality in question had in the circumstances no authority to give permission to build with the condition imposed that the owner shall only build leaving a setback of a certain space. In that case, though it was intended to add that part of the land to the street, the regular line of street in accordance with S. 91-A (1) had not been prescribed. Where such a line is prescribed, compensation for the value of the land added to the street has to be paid by the Municipality. The owner built, disregarding the condition of leaving a setback, and he was held not to have acted contrary to any legal orders of the Municipality, nor to have become liable to fine. The basis of the reasoning was that the Municipality could not legally impose the condition of a setback without paying compensation: *see* Bombay District Municipal Act, S. 91-A, and 16 Bom L R 529.[7]

The position, then, under the Act and in accordance with principle, stands thus: the Municipality as a public body is under the necessity not to exercise its authority in a capricious, wanton, oppressive, arbitrary or tyrannical manner even when acting within the defined limits of its powers. It must use even its admitted powers considerately, with a discretion suitable to the nature and importance of the duties to be discharged, and with a fair and honest judgment. Secondly, under the Act, the Municipality has been given no power to refuse in general terms permission to build. It has only power to impose conditions with reference to the location of the building in relation to any street existing or projected. Thirdly, even such conditions cannot be so imposed as to contravene the provisions for compensation when a regular line of street is prescribed. The result is that the Municipality may for consideration acquire the right to prevent the owners of land adjoining a street from building on such parts of the land as it desires to add to the street; but the Municipality is not entitled as was argued before us to prevent building sites being built upon without compensating the owners. Indeed, the learned Assistant Government Pleader very candidly and properly admitted that he could not in view either of the true construction of the Bombay District Municipal Act or of the authorities to which he called our attention support the argument which he felt bound to present.

It is nevertheless argued that though the permission to build had been wrongly refused and the Municipality could not have prevented any building being put up upon the land acquired, yet the facts were that the lands were subject to a prohibition from the Municipality to build—a prohibition to which no exception had been taken and which was assumed to be valid. Therefore it was argued that the sites must be valued as though in the market they would have been sold only as "lands struck with sterility," to use Bowen, L. J.'s expression. In our opinion that argument cannot be accepted. A mistaken view of the law cannot be taken as the basis of the value of the property. In a case where there was an "admission in the plaint and upon the argument" their Lordships said:

> The plaintiff however is not bound by an admission of a point of law nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled: I A Sup Vol 47,[8] at p. 71.

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[6] Emperor v. Onkardas, A I R 1934 Bom 154=1934 Cr C 541=148 I C 1008=35 Cr L J 834=36 Bom L R 217.

[7] Bai Fatma v. Rander Municipality, A I R 1914 Bom 112=25 I C 411=38 Bom 597=16 Bom L R 529.

[8] Juttendromohun Tagore v. Ganendramohan Tagore, (1872) I A Sup Vol 47=9 Beng L R 377=18 W R 359=2 Suther 692=3 Sar 82 (P C).

The lands acquired were suitable for building purposes. They had been used as building sites. There was nothing in law to prevent their being used as building sites at the time when the notification for compulsory acquisition was issued. They must accordingly be valued on that footing. Apart from the initial error into which the learned Judge fell, the basis on which he has valued the lands under acquisition is, in our opinion, quite erroneous. He has not considered the evidence that was before him, scanty though it was. But he has taken, as the basis of his award, the compromises into which the neighbouring owners had entered into for selling their lands to the Municipality. The Municipality had acquired lands from several owners in the vicinity at the prices of Rs. 2-8-0 and even at Re. 1 per square foot. There were in fact no materials justifying any reliance being placed on that position. No particulars were placed before the Court from which it could be inferred that the compromises were any guide for arriving at the market value. One reason to the contrary is evident even on the materials before us. Those owners may have been agreeable to giving their lands at low prices for widening the street in the expectation that the enhancement in the value of the rest of their land would more than compensate them for the low rate at which they parted with a portion of it.

Even on the erroneous basis that these sites could no more be used as building sites, the rates are in flagrant contravention of the evidence. For even in their sterile state they were let out at rents of Re. 1 or Rs. 1-8-0 per month. On that rental basis, their capitalized value, taking the low rate of 16 or 17 years' purchase, would have amounted to a little more than double the sum that the learned Judge has allowed, which itself was two and a half times the compensation allowed by the Land Acquisition Officer. There is evidence both of sales and of rents of shops in the neighbourhood. It is difficult to place much value on the evidence of the rents accruing from the shops because in the first place there is no sufficient evidence of the value of the buildings on those plots in respect of which the rents were realized, and, secondly, on valuing the sites on the rental basis, the prices that result, are at such variance with each other and at times so extravagant, that we cannot guide ourselves by those calculations. We have however satisfactory evidence of the sales of two plots of land which there is no reason to think were more valuable than those under acquisition. With reference to one, No. 2179, we have the evidence of Ex. 34, and with reference to the other, No. 1140, the evidence of Ex. 19. Making allowance for certain details to which I need not refer, the price per square foot of land under each of these sales may be taken to be very nearly the same i. e. about Rs. 12-8-0 per square foot. In view of all the evidence that rate may be considered to be fair for allowing compensation to the appellants. It is five times the amount of compensation allowed by the District Judge and 12½ times the compensation allowed by the Land Acquisition Officer. In our opinion compensation should be allowed at the rate of Rs. 12-8-0 per square foot. This will be exclusive of Rs. 40 allowed for the plinth and the addition of 15 per cent. under the Act. Costs, in proportion throughout.

Barlee, J.—I agree.

S.C./D.S. *Order accordingly.*

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BEAUMONT, C. J.

Ahmed Abdulla Rubatti—Plaintiff — Applicant.

v.

Ahmed Abdulla Dubaee—Defendant—Opponent.

Civil Revn. No. 120 of 1936, Decided on 30th November 1936, against order of Dist. Judge, Aden, in Revn. Appln. No. 48 of 1935.

(a) Aden Civil and Criminal Justice Regulation (6 of 1933), S. 15—Revision—District Judge can take fresh evidence.

Although it is rather a dangerous course to admit further evidence in revision, yet the District Judge of Aden has jurisdiction to call for fresh evidence by virtue of the wide language of S. 15. [P 181 C 1]

(b) Aden Civil and Criminal Justice Regulation (6 of 1933), S. 7—Jurisdiction—High Court of Bombay—Power of revision—High Court can revise any order passed by District Judge.

Under S. 7 of the Regulation, the High Court of Bombay may call for the record of any case which has been decided by the District Judge of Aden and in which no appeal lies, and may make such

order as therein mentioned. The section confers upon the Bombay High Court a power of revision where any case has been decided by the District Judge, whether in his original jurisdiction, or in appeal, or in revision, though the High Court will be generally slow to interfere with the exercise by the District Judge of his revisional powers. [P 181 C 1]

K. N. Koyajee—for Applicant.

Pohchaji Jamshedji—for Opponent.

Order.—In this case the plaintiff sued before the Registrar of the District Court, Aden, for Rs. 28, commission earned. The Registrar decreed the plaintiff's claim. Under S. 15 of the Aden Civil and Criminal Justice Regulation 6 of 1933, the District Judge may call for any proceedings before the Registrar at any stage or within thirty days of their termination, and may pass such orders thereon as he thinks fit. The learned District Judge in revision called a witness whose evidence he considered it necessary to hear, and having heard the evidence of that witness, he set aside the Registrar's order, and dismissed the suit. It is obviously rather a dangerous course to admit further evidence in revision, but I am not prepared to say that the District Judge had no jurisdiction to adopt the course which he did, the language of S. 15 being extremely wide.

A preliminary objection was taken that this Court has no power to revise an order made by the District Judge of Aden in revision. But under S. 7 of the Regulation this Court may call for the record of any case which has been decided by the District Judge and in which no appeal lies, and may make such order as therein mentioned. It seems to me that, that confers upon this Court a power of revision where any case has been decided by the District Judge whether in his original, jurisdiction, or in appeal, or in revision. I think, therefore, that I have the power to hear this application in revision, though I think this Court should generally be slow to interfere with the exercise by the District Judge of his revisional powers. I see no reason in this case to interfere with the order which the District Judge has made. The application, therefore, must be dismissed with costs.

B.D./A.L. *Application dismissed.*

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BROOMFIELD AND SEN, JJ.

Appa Trimbak Deshpande and *another* —Applicants.

v.

Vaman Govind Deshpande and *others* —Opposite Parties.

Civil Appln. No. 88 of 1936, Decided on 13th October 1936, for leave to appeal to His Majesty in Privy Council.

Civil P. C. (1908), S. 110—Valuation—Partition suit—Value of share of plaintiff—Subject matter less than Rs. 10,000—Decree in favour of plaintiff and defendant brother—Appeal to High Court by other defendants—Decree reversed—Application by both for leave to appeal to Privy Council—Leave held could be granted as decree of High Court involved question respecting property of value of Rs. 10,000 or upwards taking into consideration shares of both.

For the purpose of determining the value under S. 110, the decree is to be looked at as it affects the interests of the party prejudiced by it. [P 182 C 2]

In a partition suit brought by the plaintiff for recovery of his one-sixth share in the property, the valuation of the subject matter was Rs. 5,500, and the Court passed a decree in favour of the plaintiff and defendant 4, the brother of the plaintiff, but the decree was reversed by the High Court, on appeal by defendants 1 to 3. An application for leave to appeal to Privy Council was filed by the plaintiff and defendant 4 :

Held : that as the decree of the High Court affected the interests of both the plaintiff and defendant 4, the decree of the High Court involved a question respecting property of the value of Rs. 10,000 or upwards, though the share of defendant 4 was involved indirectly and that the application for leave to appeal could therefore be granted : *6 Bom L R 403, Rel. on* ; *8 Bom 31, Expl.* [P 182 C 2]

B. G. Rao—for Applicants.

G. N. Thakor, *P. B. Gajendragadkar* and *S. G. Patwardhan* — for Opposite Parties.

Broomfield, J.—This is an application for leave to appeal to the Privy Council. It was a case which involved several difficult questions of law and this Court disagreed with the trial Court and dismissed the plaintiff's suit. There has been some argument however on the question whether the value of the subject matter within the meaning of S. 110, Civil P. C., is ten thousand rupees or upwards. The suit was brought by the plaintiff to recover his one-sixth share in certain properties by partition. The trial Court allowed the suit and provided in its decree that defendant 4, a brother of the plaintiff, should also recover his one-sixth share, with mesne profits equal to those which the plaintiff would get on payment of the necessary stamp duty. The plaintiff valued his claim at Rs. 5,410 for court-fees and Rs. 5,500 for jurisdiction. There was an appeal to this Court by defendants 1 to 3. They valued the appeal at Rs. 4,279 for court-fees and Rs. 5,500 for jurisdiction. Thus both in the trial Court and in the appeal the value of the subject matter was stated to be less than Rs. 10,000. But Mr. Rao who appears for the applicants (plaintiff and defendant 4) contends that as the decree of this Court dismissing the suit and setting aside the trial Court's decree has the effect of depriving defendant 4 of his share also, the value of the subject matter is really twice Rs. 5,500, that is, Rs. 11,000.

Mr. Thakor, who appears to oppose the application for leave, argues that in a partition suit the value of the subject matter is the value of the share claimed by the plaintiff and not the value of the whole property. He relies on 8 Bom 31[1] and 6 Bom L R 403.[2] In the former case it was held that what prima facie determines the jurisdiction of a Court is the claim, or subject matter of the claim, as estimated by the plaintiff, and that the subject matter of a claim is the specific thing sought by the plaintiff. So, in a partition suit, where the plaintiff seeks for a division and separate possession of his share in joint property, it is the share so claimed which is the subject matter of the claim, and not the whole of the joint property which is sought to be divided. In the latter case, it was held that to determine the value prescribed by S. 596, Civil P. C., (which corresponds to the present S. 110) the decree is to be looked at, as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000 the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of S. 596 of the Code.

In neither of these cases, however, was there any order made in favour of a party other than the plaintiff. Applying the principle laid down in the latter of the two cases, viz., that the decree is to be looked at as it affects the interests of the party (or parties) prejudiced by it, it would appear that the decree of this Court has affected the interests of both the applicants, viz., the plaintiff and defendant 4, and that the decree of this Court does involve a question respecting property of the value of Rs. 10,000 or upwards. It is true that the share of defendant 4 is only involved indirectly, but for the purpose of para. 2 of S. 110 that is sufficient. We certify, therefore, that the decree of this Court in the appeal involves a question respecting property of the value of Rupees 10,000 or upwards. That being so, the applicants are entitled to leave irrespective of the question whether there is a substantial question of law because this Court reversed the decree of the trial Court. We may say, however, that there are substantial questions of law also involved. We grant leave accordingly. Costs will be costs in the appeal.

K.B./A.L. *Leave granted.*

✻ A. I. R. 1937 Bombay 182

N. J. WADIA AND SEN, JJ.

Sabhachand Navalchand and *others*—Plaintiffs—Appellants.

v.

Sambhoo Gyanoba Bhoj and *others*—Defendants—Respondents.

First Appeal No. 245 of 1930, Decided on 21st August 1936, against decision of First Class Sub-Judge, Poona, in Suit No. 267 of 1929.

✻ Hindu Law — Alienation — Necessity—Manager — New business — Attachment of share of adult member on his failure to pay amount due under liquor contract —Mortgage of joint family property by manager and adult members to raise attachment—Liquor business found to be new and not ancestral —Alienation held neither for legal necessity nor for benefit of estate—Mortgage is not binding on minor members of family.

The manager of a joint Hindu family cannot impose upon the minor members of the family the risk and liability of a new business started by himself and other adult members of the family. [P 184 C 1]

The share of an adult member of the family was attached by Government to recover dues of the liquor contract entered into with him. The manager and the adult members raised a loan by executing a mortgage of the joint family property to pay off the amount due and thus to raise the attachment. The liquor business was found not to be ancestral business of the family :

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[1] Lakshman Bhatkar v. Babaji Bhatkar, (1883) 8 Bom 31.

[2] De Silva v. De Silva, (1904) 6 Bom L R 403.

Held: that the liquor business was not an ancestral one; the mortgage therefore of the joint family property was not binding on the minor members of the family. [P 184 C 1]

Held also: that for failure to pay the amount due under the liquor contract, the share of the contracting co-parcener was only attached and the amount was not a charge on the joint family property. The payment thereof could not therefore be regarded as legal necessity for the mortgage. [P 184 C 2]

Held further: that the possibility of a stranger coming into the joint family property by his purchase at auction of the share of the contracting co-parcener would not fall under the category of legal necessity, nor the keeping of such stranger out of the joint family property could be regarded as benefit to the estate. [P 184 C 2; P 185 C 1]

The mortgage therefore neither being for any legal necessity nor for benefit of the estate was not binding on the minor members of the family: *6 M I A 393* (*P C*), *Expl.*; *A I R 1922 P C 237* and *A I R 1932 P C 182*, *Foll.*; *A I R 1916 Bom 130*; *A I R 1918 Bom 101*; *A I R 1922 Bom 413*; *A I R 1935 Bom 295* (*F B*) and *A I R 1931 P C 136*, *Ref.* [P 186 C 1]

A. G. Mulgaonkar, *U. S. Hattayangadi* for *G. S. Mulgaonkar*—for Appellants.

P. S. Joshi—for Respondents.

Sen, J.—The plaintiffs-appellants sued the defendants, who are the members of a joint Hindu family, to recover Rupees 9,648-7-6 with costs and future interest, and further prayed that in case the defendants failed to pay the said amount, it might be ordered to be recovered by sale of the mortgaged property, and that if the amount realized by sale of the same fell short of the decretal amount, the deficit might be ordered to be recovered from the defendants personally. The mortgage in this suit was for Rs. 5,000, out of which the sum of Rs. 900 was paid in cash and Rs. 4,100 was required to be paid to Government in respect of a liquor contract taken in defendant 3's name, on account of which Government had attached defendant 3's share in the defendants' house. The mortgage deed, Ex. 57, was signed by all the defendants, defendant 1 signing both for himself and on behalf of the minor defendants 5 to 7. The plaintiffs paid the sum of Rs. 4,100 direct to Government, and the attachment on defendant 3's share was raised. The learned Subordinate Judge held that the mortgage bond was not binding upon the minor defendants 5 to 7 and passed a decree against the other defendants. The plaintiffs have appealed, and contend that the bond is binding on the three minor defendants. The learned Subordinate Judge's grounds for his finding that the bond was not binding on the minor defendants are as follows: (1) that the liquor business was not proved to be the defendants' joint family business; (2) that the mortgage was not for the minors' benefit nor entered into in the interest of the minors. He has based his first ground on these reasons: the defendants are not *kalals* or liquor sellers either by caste or profession, their caste being *teli*; the liquor license was taken by defendant 3 in his own name alone and it was only the share of defendant 3 in the defendants' house that was attached.

The learned counsel for the appellants in this appeal has argued that the business in question was the ancestral business of the defendants, that there was legal necessity for the mortgage, in that the object was to prevent defendant 3's share being sold to a stranger, and that the principle of law enunciated in 6 M I A 393[1] applies in this case. On the first point, viz. the defendants' business being ancestral or otherwise, we have the following evidence. In the mortgage deed the mortgagors said:

> We have recently taken on account of our joint family a liquor shop at Ghodnadi from Government in the name of No. 3 out of our joint family.

It also refers to the shop not as defendant 3's shop but as "the Ghodnadi shop." It refers to the amount of Rs. 4,100 paid by the plaintiffs as "the said amount you paid on our account." We have next a statement made by defendant 3 in a criminal case against him on 24th August 1925, to the effect that the Abkari business is of the joint family. Then we have the evidence of plaintiff 2 in this case that "the liquor shop at Ghodnadi was taken in the name of defendant 3 for the entire family"; and defendant 3 states: "We also take contracts." Except for a single sentence in defendant 3's evidence there is certainly no evidence that the defendants' family or any member of it did any business in liquor prior to 1925. That sentence is: "I used to take liquor contracts." In our opinion, this evidence is altogether insufficient to establish that there was any ancestral liquor business in the defendants' family. We also find it somewhat difficult to arrive at the conclusion that the business in question has

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1. Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree, (1856) 6 M I A 393=18 W R 81 (F N)=2 Suther 29=1 Sar 552 (P C).

been satisfactorily proved to be the joint family business of the defendants. At the same time, it does not appear unlikely that the adult members of the defendants' family treated the business as a family business. This would explain the phraseology used in the mortgage deed, and perhaps the fact that the liquor license was taken in the name of defendant 3 alone is to be explained by some Government rule against such licenses being taken out jointly by more persons than one. The explanation of the fact that defendant 3, and not defendant 1, the head of the family, took the license in his own name, appears to be that defendant 1 did not at the time live in Poona, where the liquor business was conducted.

Supposing, therefore, that the business was a joint family business of the defendants, and that it was not ancestral, as we hold that it was not, it must be held to be a new business undertaken by the defendants' family. The principle applicable to a new business has been enunciated in 49 I A 108[2] and 59 I A 300,[3] and other cases. It is to the effect that the manager of a joint Hindu family cannot impose upon a minor member of the family the risk and liability of a new business started by himself and the other adult members. Applying this principle, it seems to us that the conclusion of the learned Subordinate Judge, that the mortgage bond was not binding on the minor defendants, cannot be regarded as incorrect. Mr. Mulgaonkar has, however, referred us to the law relating to the general power of a manager of a joint family business as to alienation of the co-parcenary property, as stated in Mulla's book on Hindu law, Edn. 8, paras. 241 to 243-A. In particular, he has referred to the principle that the manager of a joint Hindu family has power to alienate for value the joint family property, so as to bind the interests of both adult and minor co-parceners in the property, provided that the alienation is made for a legal necessity, or for the benefit of the estate. It has been contended that the mortgage was entered into for a legal necessity, both the necessity for payment of Government dues and that of preventing a stranger from coming into the joint family property constituting such legal necessity. As regards the payment of Government dues, this cannot be said to have been a charge on the joint family property, as only, the share of defendant 3 in the joint house was attached. It cannot, therefore, in our opinion, be said that the necessity for paying the amount due to Government was a legal necessity for the whole joint family, though the adult members of the family may have felt a moral obligation to pay the same.

Next, we come to the necessity for keeping a stranger out of the joint family property. There does not appear to be any case bearing on this point, and we find it difficult to hold that the danger of the share of one of the co-parceners being sold to a stranger was such as to give rise to a legal necessity for the whole joint family of preventing such partial alienation. In this connexion our attention has been drawn also to the possibility that if the purchaser of defendant 3's share wanted to have partition of that property, his remedy would be nothing short of a suit for general partition : *see* Mulla's Principles of Hindu law, Edn. 8, p. 299. It has been held that the purchaser of the undivided interest of a co-parcener in a specific property belonging to the joint family is not entitled to a partition of that property alone, and that he can only enforce his rights by a suit for a general partition : *see* 24 Bom 128[4] and 46 Bom 925.[5] Such a contingency might possibly be regarded as a grave danger to the joint status of the defendants ; but it seems that this could be prevented by the co-parceners themselves suing the purchaser for partition of the alienated property without bringing a suit for a general partition : *see* 41 Bom 347[6] and 43 Bom 17.[7] In any case however, as we have already said, we find it difficult to take the view that the possibility of a stranger coming into the joint family property was such as would fall under the category of legal necessity.

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[2] Sanyasi Charan Mandal v. Krishnadhan Banerji, A I R 1922 P C 237=67 I C 124=49 I A 108=49 Cal 560 (P C).

[3] Benares Bank, Ltd. v. Hari Narain, A I R 1932 P C 182=137 I C 781=59 I A 300=54 All 564 (P C).

[4] Shivmurteppa v. Virappa, (1900) 24 Bom 128=1 Bom L R 620.

[5] Ishrappa v. Krishna, A I R 1922 Bom 413=67 I C 833=24 Bom L R 428=46 Bom 925.

[6] Naro Gopal v. Paragauda, A I R 1916 Bom 130=39 I C 23=19 Bom L R 69=41 Bom 347.

[7] Hanmandas Ramdayal v. Vallabhdas, A I R 1918 Bom 101=46 I C 133=20 Bom L R 472=43 Bom 17.

Similar remarks would appear to be applicable to the argument based on "the benefit of the estate" which would entitle a manager of the joint Hindu family to alienate the joint family property so as to bind the interests of both the adult and the minor co-parceners. The latest Bombay case in which the expression "benefit of the estate" has been interpreted is 37 Bom L R 427.[8] In this case, a Full Bench has decided that the expression "benefit of the estate" is not intended to include every transaction which is advantageous or which a prudent owner will carry out in connexion with his own estate. It has also been held that this expression is not necessarily limited to a transaction which is of a character to protect or preserve the property of the owner. The expression "benefit of the estate" appears to have been first used in connexion with the question of alienating a minor's interest, in *Hunoomanpersaud's case.*[1] Mr. Mulgaonkar has based a large part of his contention on the theory of the "benefit of the estate," as applied in 58 I A 173.[9] As I have pointed out above, no case has been brought to our notice deciding either that the necessity to keep out a stranger forms a legal necessity or is covered by the expression "benefit of the estate." As pointed out in *Hemraj* v. *Nathu,*[8] the benefit has to be determined with reference to the facts of each case. We find in this case that the liquor contract was taken in the name of only one of the defendants, and when the contract was taken the possibility of defendant 3's share being attached and sold could not be said to have been absent from the minds of the other defendants. It does not appear what share exactly defendant 3 had in the joint family property ; as there are as many as eight defendants in this case, it may be presumed that his share was not large. The argument based on the necessity of keeping a stranger out of the joint family property again appears to have been advanced for the first time in this Court. No question on this point has been asked to any of the witnesses examined in this case, nor has the learned Subordinate Judge referred to this argument. It seems to us a far-fetched argument to say that the keeping of a stranger out of the joint family property was regarded by any of the defendants as conducive to the benefit of this estate. Coming to the rulings in *Hunoomanpersaud's case*[1] and *Ram Krishna Muraji* v. *Ratan Chand,*[9] Mr Mulgaonkar has particularly invited our attention to the following passage in the first case (p. 424) :

> Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management ; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution but is himself deceived.

Ram Krishna Muraji v. *Ratan Chand*[9] applies this principle to the case of the ancestral business of a Mitakshara joint family. We have already held that in the present case the business cannot be said to be ancestral. As to the general principle referred to in *Hunoomanpersaud's case,*[1] we must hold that it is qualified and restricted by the later decisions of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan*[2] and *Benares Bank, Ltd.* v. *Hari Narain,*[3] and that therefore it cannot be said in the case of a new business started by adult members of a joint family, that they can impose upon the minor members of the family the risk and liability arising out of that new business. This seems to us clear, though the exact relationship between *Hunoomanpersaud's case*[1] and these later decisions do not appear to have been indicated in any decisions of the Privy Council. The question in *Benares Bank, Ltd.* v. *Hari Narain*[3] arose out of a case of ancestral business, while in *Hunoomanpersaud's case*[1] the question of a new business does not appear to have been raised at all. The general principle

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8. Hemraj v. Nathu, A I R 1935 Bom 295=157 I C 406=59 Bom 525=37 Bom L R 427 (F B).

9. Ram Krishna Muraji v. Ratan Chand, A I R 1931 P C 136=132 I C 613=58 I A 173=53 All 190 (P C).

enunciated in *Hunoomanpersaud's case*[1] must, accordingly, be regarded as modified by the decisions relating to a minor's liability in the case of a new business. Again, in the present case, it is not clear what kind of inquiry was made by the plaintiff when he advanced Rs. 5,000 to the defendants as to the necessity for the loan or as to the business of the defendants being ancestral. There is no doubt as to the general proposition that the benefit of a creditor should not suffer when he has acted honestly and with due caution. But in this case, unless the plaintiff satisfied himself as to the real necessity for the loan and as to the business of the defendant being ancestral, it cannot be said that he acted with due caution. The point as to the business being ancestral is important. Unless it was ancestral the Privy Council decisions of 1922 and 1932 clearly protected the interests of the minor defendants against any claim arising out of the mortgage. This was, therefore, a point which required particular investigation by the person advancing the loan. Therefore it does not appear to us that even taking the principle enunciated in *Hunoomanpersaud's case*[1] it supports the appellant's case. We accordingly, hold that the learned Subordinate Judge was right in holding that the mortgage bond was not binding on the minor defendants 5 to 7, and that therefore the appeal must be dismissed with costs.

N. J. Wadia, J.—I agree.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 186

BROOMFIELD AND SEN, JJ.

Ramnarayan Baburao Kapur—Accused—Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 59 of 1926, Decided on 6th October 1936, against order of Presidency Magistrate, Addl. Court, Mazagaon, Bombay.

(a) Criminal P. C. (1898), S. 199—Offence under S. 498, I. P. C.—Woman discarded by husband living with father and brother—Complaint by brother—Brother not taking care on behalf of husband—Complaint held was not competent and conviction invalid.

The words "on his behalf" in S. 199 must be given some meaning. It is not enough that a person should take care of the wife instead of the husband because the husband will not take care of her and there is no one else to do it. [P 189 C 2]

A person was convicted of an offence under S. 498, I. P. C., for enticing a married woman. The woman was discarded by her husband who ceased to take care of her. She stayed with her father and brother who took care of her. The complaint of the offence was made by the brother:

Held : that the complaint by brother was not competent under S. 199 as the brother was acting on his own behalf and not under the authority of the husband and therefore the conviction was invalid. [P 189 C 2]

(b) Penal Code (1860), S. 498— Woman discarded by husband living with her father and brother—Father and brother not taking care on behalf of husband—Elopement with accused—Accused cannot be convicted.

It is an essential ingredient of the offence under S. 498 that the person concerned shall have been taken or enticed from a person having the care of her on behalf of the husband. [P 189 C 2]

Where a person was convicted of an offence under S. 498 for enticing a married woman who was living with her father and brother having been discarded by her husband and the father and the brother were taking care of her on their own account and not on behalf of her husband :

Held : that the person could not be convicted. [P 189 C 2]

(c) Criminal P. C. (1898), S. 177—'Ordinarily' means except otherwise provided in Code—Accused enticing and taking married woman in Madras and taking her to Bombay —Offence is not continuing offence—Bombay Court has no jurisdiction.

The 'taking' under S. 498, I. P. C., is not a continuing offence but is complete as soon as the person concerned is out of the keeping or control of the guardian. The same applies to enticing also. No doubt, enticing in itself may be a continuous process, but enticing from a particular person cannot be so, i. e. it cannot continue after that person's control has ceased. The word 'ordinarily' in S. 177 means 'except where provided otherwise in the Code.' [P 189 C 2; P 190 C 1]

Where therefore a person who enticed and took a married woman in Madras and brought her to Bombay :

Held : that the Bombay Court had no jurisdiction : *A I R 1928 Bom 140, Foll.* [P 189 C 2]

(d) Penal Code (1860), S. 498— Woman discarded by husband living with father and brother—She falling in love with accused next door neighbour—Woman leaving home and going away with accused —Elopement held not due to enticing but held joint adventure, motive being mutual affection.

A woman was discarded by her husband and was living with her father and brother. She was not happy. She fell in love with the accused who was her next door neighbour and both of them eloped to another place. The accused having been convicted under S. 498 :

Held : that there was no enticing, that the elopement was a joint adventure in which the motive force was mutual affection. [P 190 C 1]

(e) Penal Code (1860), S. 498 — Word 'detains' means 'keeping back' — Woman

eloping and living with accused of her own will—Accused cannot be said to detain her.

The word 'detains' in S. 498 has the ordinary meaning of 'keeping back.' There may be various ways of keeping back. It need not necessarily be by a physical force, but the use of the word does require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman, and it cannot properly be said that a man detains a woman if she has no desire to leave and on the contrary wishes to stay with him. [P 190 C 1, 2]

Where therefore a woman eloped with the accused, lived with him willingly and was not willing to leave him and was also a free agent:

Held: that there was no 'keeping back' within the meaning of S. 498: *A I R 1933 Bom 489, Foll.* [P 190 C 2]

(f) Penal Code (1860), S. 497—Case registered under S. 498—Complaint by brother, but no specific charge of adultery—Accused cannot be convicted under S. 497 there being no legal complaint.

A complaint by the husband is an essential requirement which cannot be dispensed with. If a criminal charge of adultery is to be preferred a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, the requirements of S. 199, Criminal P. C., will not have been satisfied. [P 191 C 1]

A case was registered under S. 498 on a complaint by the brother of a woman in which he alleged that the woman was living with the accused and was in danger of being ruined. There was no other specific complaint for the offence under S. 497. The Magistrate convicted the accused of an offence under S. 497:

Held: that there was no legal complaint of the offence and that the conviction was illegal: *29 Cal 415*; *14 Bom L R 141* and *31 Bom 218, Foll.* [P 190 C 2; P 191 C 1]

G. C. O'Gorman, P. B. Ranadive and *M. D. Dharkar*—for Accused.

N. C. M. Acharya—for Complainant.

P. B. Shingne—for the Crown.

Broomfield, J.—The appellant in this case, Ramnarayan Baburao Kapur, has been convicted of offences under Ss. 498 and 497, I. P. C., in respect of Ranganayaki, the wife of R. Shrinivas Raghavan, and has been sentenced for each offence to rigorous imprisonment for three months and a fine of Rs. 500. The charges were, firstly, that between 23rd January 1935 and 31st January 1935 at Bombay he took or enticed away Ranganayaki whom he knew to be a married woman from her brother who had the care of her on behalf of her husband with the intent specified in S. 498; secondly, that between 31st January 1935 and 15th February 1935 he detained her at Bombay with the same intent, and, thirdly, that between the dates he committed adultery with her at Bombay.

The case took a year to dispose of in the Magistrate's Court and the record is very bulky. I shall endeavour to be as brief as possible, but it will be necessary to set out the facts at some little length. Ranganayaki was born on 28th September 1916. Her father, who is an advocate of the Madras High Court, lives at Chetpet, a suburb of Madras. On 14th July 1932, the girl was married to R. Shrinivas Raghavan, she being at that time under sixteen years of age. She had not attained puberty. However, she went to her husband's house, and the period between the marriage and 13th September 1932 i.e., about two months, was spent by her partly at her husband's house and partly with her parents. The longest period she stayed in her husband's house was about a month. Ranganayaki says that the marriage was not consummated. From the very beginning, there were quarrels and the relations between them seem to have been most uncomfortable. Ranganayaki was finally turned out by her mother-in-law on 13th September and after that she never went back to her husband's house.

It appears that the marriage was a failure from the first. Ranganayaki blames her husband to some extent and also his mother. She may have had reasons for her complaints. It appears that her husband's mother is suffering from leprosy and Ranganayaki's father has admitted that she treated the girl harshly; also that she had her son, Ranganayaki's husband completely under her thumb. On the other hand, of course, it may have been partly Ranganayaki's fault, or it may have been simply a case of complete incompatibility. The fact remains and it is perfectly clear that it was an unsuccessful marriage and there was no love lost between them.

At the beginning of December 1932, Ranganayaki and her two sisters were all abducted by somebody called Doss when they were on their way to school and were taken to Cuddalore and Pondicherry from which place they were rescued by their father and brother. Ranganayaki's story is that they went away with this man because they were not treated well at home. After that the girl was sent to a sort of boarding school with her sister, and in June 1933, she came back to live in her father's house at Chetpet. In October of that year or a little before the accused rented a house next door. He got into business touch with Ranganayaki's father and in a very short time he became very friendly with Ranganayaki. In November, when her father and elder brother were away from home Ranganayaki went off with the accused to Bangalore and stayed with him for five days. She was then brought back by her father. The accused was not prosecuted at that time because, as Ranganayaki's father says, he wanted to avoid a scandal. Soon after this Ranganayaki's brother opened a box belonging to her and found some love letters written to her by the accused. In consequence of this, she was taken away to Mambalam and various other places. On 15th February 1934, a complaint was made to the Commissioner of Police, Madras, that the accused was trying to take the girl away. In the same month Ranganayaki's father-in-law, i. e., her husband's father, died and she was taken to her husband's house to pay a visit of condolence. There are conflicting accounts of what happened on that occasion: Ranganayaki says that as soon as they got to the house her husband pushed them out again; her father denies that there was any unpleasantness between them and the husband, although he admits that the mother-in-law refused to see Ranganayaki.

In May 1934, Ranganayaki was taken to a place called Pallavaram, 12 miles from Madras, and she was afterwards sent to Vellore. She came back to Chetpet in June 1934. In July 1934, her husband married again. All this time her education was being continued. Private tutors were employed by her father and she was working for the Matriculation Examination. At the end of 1934 her father's suspicions were aroused by seeing her maidservant talking to the servant of the accused. So he forced open a box belonging to her and found a number of letters written by the accused and a photograph of him. These letters showed that they were planning to escape for the purpose of getting married on or about 4th January. Ranganayaki was locked up, however, and that was prevented. But on 23rd January 1935, when the girl's father was absent from the house and her brother, the complainant, was having his lunch, she seized the opportunity of escaping and went away with the accused in a motor car and then took an aeroplane and flew to Bangalore. She was found with the accused in Bombay on 14th February. They were staying in a flat in Lamington Road. On 15th February a complaint of an offence under S. 498 was made by the brother.

The defence, to put it in a nutshell, is that Ranganayaki was discarded by her husband and unhappy at home and she and the accused are lovers and agreed to elope together. Ranganayaki fully supports the accused in this story. We have come to the conclusion that the conviction of the accused is quite unsustainable for several reasons. The first point is as to the validity of the complaint. It is laid down in S. 199, Criminal P. C., that no Court shall take cognizance of an offence under S. 497 or S. 498 except upon a complaint made by the husband of the woman, or, in his absence, made with the leave of the Court by some person who had the care of such woman on his behalf at the time when such offence was committed. There is some difficulty as to the meaning of the words "in his absence" in this section. One view, which has been accepted by the Magistrate, is that the words mean "when the husband is not staying in the same house as the wife at the time of the offence." There is some authority for this view though not in any case reported in the authorised reports. Another view, suggested by the learned Government Pleader, is that, the words only mean "if the husband is absent at the time of the complaint." For that view I think there is no authority. A third view, contended for by Mr. O'Gorman, learned counsel for the appellant, is that the husband cannot be regarded as absent within the meaning of the section unless he is not available to make the complaint. In the present case there was nothing to prevent the husband making the complaint except that he was not asked or did not care to do so. There is no direct authority for this view either. Mr. O'Gorman has relied on some observations of Sir Lawrence Jenkins, C. J. in 25 Bom 151[1] as to the intention of the Legislature to reserve the right to complain to the husband in such cases. It is not necessary I think to attempt an exhaustive definition of the meaning of these words. We think that if the prosecution had succeeded in making out its case that the complainant had the husband's authority to take care of Ranganayaki on his behalf, so that the complainant stood in the place of the husband for the time being, while the husband was residing quite independently in another part of the town, it would have been difficult to say that the requirements of S. 199 were not satisfied. We should have been prepared to hold in that case that the husband was absent within the meaning of the section. But as a matter of fact we are quite unable to accept the prosecution case in that respect. The evidence of the complainant's father on this point is as follows:

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[1] **Chhotalal v. Nathabhai, (1901) 25 Bom 151= 2 Bom L R 665 (F B).**

> After September 1932, she did not go back to her husband's place. Her husband subsequently sent word that she could stay with us safely as he was unable to make arrangements for her stay all of a sudden in a separate place. Her husband was living in a rented house where there was not sufficient accommodation. It was for this reason, I said, that I and my son had the care of Ranganayaki on behalf of her husband. This message was sent through S. P. S. Raghavan, uncle of her husband. He personally came and saw me. He came and told me that I and my son should take charge of my daughter Ranganayaki on behalf of her husband as her husband did not relish her staying with him (i. e. the uncle) who had offered a temporary residence for her. Subsequently her husband sent word that Ranganayaki should stay with him (apparently that means the uncle again) along with his mother.

The witness has also stated that when he was away from home he used to leave the complainant in charge. The husband's uncle, referred to in this evidence, has not been called as a witness. The evidence of the father and that of the complainant, which carries the matter no further, is quite insufficient by itself to show any sort of delegation of the husband's authority to either of them. It is quite clear that within a short time of the marriage the husband ceased to care for Ranganayaki, if he ever had done so, and gave her up as a bad job. The few letters he wrote to her in the early days of the marriage show very little affection or patience, and after October 1932, he never wrote at all either to her or to her father. He never came near the house, never inquired after her, never sent her any presents. He was not consulted about her being educated, and coached for Matriculation. It seems that he did not approve of higher education for women and had told her father so. When Ranganayaki went off with the accused, the husband was not consulted about taking proceedings. He was not even informed of the affair by the complainant or his father. As far as the evidence goes, he has never taken the slightest interest in the present case. It is quite true that Ranganayaki admitted when she was first brought before the Magistrate that she was under the protection of her father and brother in Madras. No doubt she was under their protection and care, but that is not enough. It has to be shown that they had the care of her on behalf of her husband.

The learned Magistrate is quite right in saying that express delegation is not necessary. But the words 'on his behalf' must be given some meaning. It is not enough that a person should take care of the wife instead of the husband because the husband will not take care of her and there is no one else to do it. Here the husband had obviously washed his hands of the girl, for the time being at any rate, and having nowhere else to go she went to her parents' house. What happened was simply that her father and brother treated her as though she were still subject to the paternal authority or, to the authority of the senior members of the Hindu joint family. (The complainant, I may say, is only a few years older than Ranganayaki herself.) I daresay that both of them did their duty according to their lights and they did what they thought was best for the girl. But the fact remains that they were acting on their own authority or assumed authority and not by the authority or on behalf of the husband. That being so, the complaint is not competent under S. 199 and that in itself is sufficient to invalidate the conviction. In addition however it is an essential ingredient of the offence under S. 498 that the person concerned shall have been taken or enticed from a person having the care of her on behalf of the husband, and that fact not having been established, the conviction under count No. 1 of the charge cannot be sustained.

The next point is that the taking and the enticing, if there was any, obviously took place in Madras and the Magistrate in Bombay had no jurisdiction to try these offences. It is laid down in S. 177 of the Code that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. It has been repeatedly held in cases under S. 361, I. P. C., (where the same words are used) that the 'taking' in these cases is not a continuing offence but is complete as soon as the person concerned is out of the keeping or control of the guardian. The same applies to enticing also. No doubt enticing in itself may be a continuous process, but enticing from a particular person cannot be so, i. e., it cannot continue after that person's control has ceased. The word 'ordinarily' in S. 177 means "except where provided otherwise in the Code": *see* 30 Bom L R 387.[2] There are no special provisions as to the trial of offences under S. 498. Cl. (4), S. 181 only applies to kidnapping and abduction. As a matter of fact, speaking for myself, I doubt if there is any satisfactory and sufficient evidence that there was any enticing in this case. Ranganayaki says in her evidence:

> I informed the accused that I was discarded by my husband. At my suggestion the accused sought the advice of a lawyer as I was anxious to marry him. The accused was also anxious to marry me. I had fixed 4th January 1935, to leave with the accused. It was fixed at my suggestion. The subsequent change to 23rd January 1935, was also at my suggestion. I was anxious to leave Madras as I did not like Madras. It was my love and affection for the accused that made me go with the accused and not the ornaments, money and diamond rings which he offered me.

No doubt Ranganayaki may be infatuated with the accused and her evidence to some extent is suspected for that reason. It is quite possible also, as the learned Government Pleader suggests, that the accused may have deceived her in many ways. But considering the whole history of the affair as it appears in evidence, I cannot see any reason to doubt that the two were in love with one another and the elopement was a joint adventure in which the motive force was mutual affection and not any enticement by the accused. So far as the second count of the charge is concerned, failure to prove that the complainant had the care of Ranganayaki on behalf of her husband would not be material. But the question here is whether there really was anything that amounts to detention. The meaning of the word 'detains' in S. 498 has been recently discussed in 58 Bom 88.[3] It was pointed out there that the word has its ordinary meaning of 'keeping back.' There may be various ways of keeping back. It need not necessarily be by a physical force, but the use of the word does require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman, and it cannot properly be said that a man detains a woman if she has no desire to leave and on the contrary wishes to stay with him. It seems to me in this case that it cannot be said in any sense that Ranganayaki was kept back by the accused either from her husband or from the complainant. She has no more use for her husband than he has for her and she was evidently most unhappy at home. When she was examined by the Magistrate in the preliminary proceedings on 4th March 1935, she said:

> It is not true that I am unlawfully and illegally detained. It is not true that my life is in danger. My liberty is not in any way fettered. I am a free agent and I am able to do what I like. I am about 18 years and five months old. I have sufficient means of my own here and I am able to look after myself. I do not want to go out of Bombay. I shall appear in Court whenever required. I do not want to go to my father or to my brother.

I think that neither force nor persuasion was at all necessary to keep her with the accused. She was a free agent as she says and stayed with him because she wished to do so. It would be impossible to say that the accused detained her unless the word is to be taken to mean no more than maintain or harbour, which I think cannot be the case. Lastly, coming to the charge of adultery, it appears that there was no legal complaint of this offence. What was alleged in the complaint was that Ranganayaki was putting up with the accused; that he proposed to elope with her and marry her; that her life was likely to be ruined and that it was dangerous to allow her to remain with the accused and absolutely necessary to rescue her before it was too late. Nowhere was it stated that adultery had been committed. Nor was any statement made to that effect in any of the preliminary proceedings. The case was registered as one under S. 498 and there is nothing to show that it was treated by anybody as anything else until the recording of certain evidence in the course of the actual trial. The learned Magistrate's view is that if a petition contains an allegation of facts which, if proved by evidence, would constitute a particular offence, then it may be regarded as a complaint of that offence. That may be so. But the necessary averments must be present. It is not enough

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2. Emperor v. Goverdhan Ridkaran, A I R 1928 Bom 140=109 I C 355=29 Cr L J 533=30 Bom L R 387.
3. Emperor v. Mahiji Fula, A I R 1933 Bom 489 =1933 Cr C 1593=147 I C 43=35 Cr L J 376 =58 Bom 88=35 Bom L R 1046.

to say, as the complainant did say in his complaint, that the girl was putting up with the accused and in danger of being ruined and so on. Thus even on the footing that the complainant was competent to make the complaint at all, there is in fact no complaint of the offence of adultery and it was illegal to convict the accused of it.

The learned Government Pleader referred us to a case in 20 Cal 483[4] as authority for the proposition that the Court has power to frame a charge of an offence under S. 497 or S. 498 even without a complaint by the husband. The Calcutta High Court however took a different view in a later case, 29 Cal 415[5] and this High Court in 14 Bom L R 141[6] and 31 Bom 218[7] has also taken the view that a complaint by the husband is an essential requirement which cannot be dispensed with. If a criminal charge of adultery is to be preferred a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, the requirements of S. 199 of the Code will not have been satisfied. The point is also made clear by Cl. 3, S. 238. For these reasons the appeal must be allowed and the convictions and sentences of the accused set aside. The bail bonds are cancelled.

S.C./D.S. *Appeal allowed.*

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[4] Jatra Shekh v. Reazat Shekh, (1893) 20 Cal 483.

[5] Chemon Garo v. Emperor, (1902) 29 Cal 415=6 C W N 677.

[6] Emperor v. Imankhan, (1912) 14 Bom L R 141=14 I C 671=13 Cr L J 287.

[7] Emperor v. Isap Mahomed, (1907) 31 Bom 218=5 Cr L J 164=9 Bom L R 148.

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* A. I. R. 1937 Bombay 191

BEAUMONT, C. J. AND MACKLIN, J.

Emperor

v.

Yesa Nana Didwagh and *others*—Accused.

Criminal Revn. No. 123 of 1926, Decided on 18th November 1935, made by Addl. Sess. Judge, Satara.

(a) Registration Act (1908), S. 83—Applicability—S. 83 does not apply to offences committed under the Act but not coming to knowledge of registering officer.

Section 83 deals only with a prosecution for any offence under the Act "coming to the knowledge of a registering officer in his official capacity," and it provides in effect that where an offence comes to the knowledge of the registering officer in his official capacity, a prosecution may be commenced by or with the permission of the officers mentioned in the section. But S. 83 has no application whatever to cases in which offences are committed under the Act, but those offences do not come to the knowledge of the registering officer. [P 192 C 1]

*** (b) Registration Act (1908), S. 83—Construction—S. 83 is enabling and not prohibitory—For offence under S. 82 sanction of registering officer under S. 83 may or may not be obtained.**

Section 83 is not prohibitory either in terms or intention. On the contrary, it is an enabling section and provides that a prosecution for any offence which comes to the knowledge of the registering officer in his official capacity may be commenced by or with permission of specified registration officers. This being so, for prosecution for offence coming to the knowledge of the registering officer in his official capacity, sanction of registration officers under S. 83 may or may not be obtained: *11 Cal 566 (F B)* and *A I R 1918 Mad 439, Rel. on*; *A I R 1934 All 963 (F B)* and *A I R 1927 Rang 61, Dissent.* [P 192 C 2]

P. B. Shingne—for the Crown.

S. G. Patwardhan for *S. G. Chitale* and *J. C. Shah* for *B. N. Lokur*—for Accused.

Beaumont, C. J.—This is a reference made by the Additional Sessions Judge of Satara asking us to quash a committal order under S. 215, Criminal P. C. Certain persons have been committed by the Magistrate to the Sessions Court of Satara on charges under Ss. 419 and 467, read with Ss. 109 and 114, I. P. C., and S. 82, sub-ss. (c) and (d), Registration Act. The learned Judge takes the view that the prosecution under S. 82, Registration Act, is incompetent without the sanction of the registration authority under S. 83 of the Act, and for that reason he invites us to quash the committal order. The question whether a sanction to a prosecution under S. 82, Registration Act, is required under S. 83 has given rise to a difference of opinion amongst certain of the High Courts of India, but this Court does not seem to have expressed any opinion upon the subject. Now, reading the Act in the first place, apart from authority, the sections of the Act imposing penalties are Ss. 81 and 82. S. 81 imposes a penalty on a registering officer and every person employed in his office for the purpose of the Act commits certain offences, and S. 82 deals with offences committed before a registering officer. The section deals with making a false statement before a registering officer, intentionally delivering to a registering officer a false copy or translation of a document, falsely personating another in any proceeding or inquiry under the Act, and abetment of any of those offences. Then comes S. 83 which provides that:

> (1) A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of the Inspector-General, the Branch Inspector-General of Sindh, the Registrar or the Sub-Registrar, in whose territories, district or sub-district, as the case may be, the offence has been committed.

I must confess that but for the difference of opinion which has arisen on the construction of the Act, I should have thought that its meaning was perfectly plain. S. 83 deals only with a prosecution for any offence under the Act "coming to the knowledge of a registering officer in his official capacity," and it provides in effect that where an offence comes to the knowledge of the registering officer in his official capacity, a prosecution may be commenced by or with the permission of the officers mentioned in the section. But the section has no application whatever to cases in which offences are committed under the Act, but those offences do not come to the knowledge of the registering officer. In a majority of cases probably the registering officer does not know whether a document produced before him is a false document or not, or whether a person appearing before him is personating some other person. To those cases S. 83 seems to me in terms to have no application whatever. This view of the section has been taken by the High Court of Calcutta in 11 Cal 566[1] and by the High Court of Madras in 40 Mad 880.[2] On the other hand, the High Court of Allahabad in a series of cases, of which the latest is a Full Bench decision, 57 All 412,[3] has taken the view that S. 83 is a prohibitory section, and that it prevents any prosecution under S. 81 or S. 82 without the sanction of the officers specified in S. 83. That view has also been adopted by the Rangoon High Court in 4 Rang 437.[4] The learned Judges who take that view have given reasons, as to the cogency of which I am not altogether satisfied, for thinking that the Legislature must have intended that no prosecution should take place under the Indian Registration Act, without the sanction of the registration officers.

But they have entirely failed to bring conviction to my mind that, if the Legislature ever entertained such an intention, they have given effect to it by S. 83 of the Act. There are a great many enactments which constitute offences, and prohibit any prosecution in respect of those offences without obtaining a certain sanction. One may illustrate S. 195 and the following sections of the Criminal Procedure Code in which the phraseology adopted is that no Court shall take cognizance of certain offences without obtaining a certain sanction. Another illustration is the Indian Stamp Act, S. 70, in which the phraseology is that no prosecution in respect of any offence punishable under the Act shall be instituted without a certain sanction. And again S. 29, Arms Act of 1870, where the language provides that where an offence has been committed, no proceeding shall be instituted without previous sanction. Those are clearly prohibitory sections. S. 83, Registration Act, is not prohibitory as far as I can see, either in terms or in intention. On the contrary, it is an enabling section and provides that a prosecution for any offence which comes to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of specified registration officers. I am quite unable to construe that section as being of a prohibitory character. In my opinion, therefore, the committal order was correct and no order will be made on the reference.

Macklin, J.—I agree. To my mind there is no cogent reason for not giving to the section the literal meaning of the words used, which is that, when a prosecution for an offence under the Act does come to the knowledge of a registering officer in his official capacity, then he or some one with his permission may start a prosecution. So far as it goes, the Act does not in terms prevent a prosecution from being started by a private person not in an official capacity. What it does do is to enable an official to start a prosecution in his official capacity. But for the enactment of that section I take it that the ordinary rule that any one may set the

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1. Gopi Nath v. Kuldip Singh, (1885) 11 Cal 566 (F B).
2. *Re* Piramu Nadathi, A I R 1918 Mad 439=38 I C 976=18 Cr L J 416=40 Mad 880.
3. Emperor v. Muhammad Mehdi, A I R 1934 All 963=1934 Cr C 1291=152 I C 667=36 Cr L J 137=57 All 412=1934 A L J 965 (F B).
4. Nga Pan Gaing v. Emperor, A I R 1927 Rang 61=99 I C 401=28 Cr L J 145=4 Rang 437 =5 Bur L J 156.

criminal law in motion would still have applied; but a prosecution for an offence under this Act, even if started by one of the officers named in S. 83 or with his permission, would still have been a prosecution not in an official capacity but in a private capacity. What the section does is to enable the officers named to use their official position for the purpose of prosecution without personal risk, and I do not think that any other interpretation of the section is justified by the words used.

P.R./D.S. *Order accordingly.*

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BROOMFIELD AND SEN, JJ.

Suraji Fulaji—Plaintiff-Appellant.

v.

Secretary of State—Respondent.

Second Appeal No. 835 of 1932, Decided on 14th October 1936, from decision of Asst. Judge, Ahmedabad, in Appeal No. 56 of 1921.

Evidence Act (1872), S. 110—Dispute with Government—User of plot by plaintiff must be such as would lead to presumption of title—Mere tethering of cattle for number of years and erecting hedges and temporary otli on plots in suit is not sufficient to constitute such legal possession as to raise presumption of title—Plaintiff's case cannot be strengthened by weakness in defendant's case—Burden of proof does not shift on to Government under S. 110.

In a suit against Government for declaration that he was the owner of certain plots in a village, the plaintiff adduced oral evidence to show that he had been using a large area of them for the purpose of tethering cattle and storing grass and that he had an otli standing thereon for a number of years. It was also proved by him that he had erected hedges to the west and south of the plots:

Held: that the kind of user proved by the plaintiff could not establish anything beyond his undisturbed user for a certain period. It was however not sufficient to prove such kind of legal possession as would give rise to a presumption of title in his favour. Proof of such kind of possession was not sufficient to throw the burden of proof on to Government under S. 110 of the Act. [P 195 C 1]

Held also: that though the Government did not succeed in proving its allegations nor made any attempt to contradict or refute the plaintiff's evidence as to his acts of user the plaintiff not having proved such possession as would raise presumption of title in his favour, the plaintiff's case could not be strengthened by any weakness in the defendant's case: *A I R 1916 Bom 296*; *25 Bom 287*; *20 Bom 798*; *A I R 1921 Bom 177*; *20 Cal 834* (*P C*) and *16 Bom 338, Disting.* [P 195 C 1]

U. L. Shah—for Appellant.

B. G. Rao—for Respondent.

1937 B/25 & 26

Sen, J.—The plaintiff-appellant sued the Secretary of State, the defendant-respondent, for a declaration that he is the owner of the land in suit and for a consequential injunction. The land in suit consisted of two plots marked X and Y in the map which has been produced in this case. The plaintiff's case is that these two plots belong to him and have been in the possession of his family from ancient times. The contention of the defendant is that the plot marked Y is used as a passage by the village people visiting or passing through the locality, that the plot marked X is an open wada and that both the plots belong to Government under S. 37, Bombay Land Revenue Code. It seems that a City Survey was held in respect of the lands in the village site in 1921 and that in 1922 the District Deputy Collector held an inquiry in which he held that both these plots belonged to Government. The plaintiff's appeal to the Collector was dismissed in 1926. The oral evidence adduced for the plaintiff was to the effect that there were old hedges to the south and west of the land Y; that a new hedge was put up on the north about ten years ago and that the plaintiff had been in possession of the two plots for the last 30 or 40 years. The trial Court held that the plaintiff must be regarded as being in possession from remote times and that his title must be presumed from such possession. The learned Subordinate Judge accordingly decided the suit in plaintiff's favour.

In the lower appellate Court the decision of the learned Subordinate Judge as to plot X and as to one part of the plot Y was upheld, and as to two other parts of Y it held that the presumption under both the Customary law and S. 37, Bombay Land Revenue Code being that Government is the owner of unoccupied village site, the plaintiff, in order to succeed, must prove possession for the statutory period, and that this not having been done Government (i.e., the defendant) must be held to be the owner. Those two parts of plot Y are the otli shown by the letters *ABD* in the map and the portion of Y which is exclusive of this otli as well as exclusive of the land between Survey Nos. 51 and 52. The trial Court relied as regards the law applicable to this case on the decisions in 40 Bom 392[1]

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[1] Secretary of State v. Gulam Rasul, A I R 1916 Bom 296=34 I C 535=40 Bom 392=18 Bom L R 243.

25 Bom 287[2] and 20 Bom 798.[3] As regards 45 Bom 789[4] relied on by the defendant, the learned Subordinate Judge remarked:

> The correctness of the decision in 25 Bom 287[2] is doubted in 45 Bom 789[4] but that decision is not overruled. Moreover, in 45 Bom 789[4] there was a Ghabhan Register and therein the land in question was entered as a Government ghabhan. Here there is no record to prove the title or possession of Government prior to 1921. The final decision in 45 Bom 789[4] rested on the particular circumstances of that case.

The lower appellate Court held that 25 Bom 287[2] was "directly overruled" by 45 Bom 789[4] and stated the legal position thus:

> By the Customary law Government is the owner of unoccupied village sites. S. 37 strengthens this title; for if it can be shown that a site at some time was occupied, the presumption of title arises under this section also in favour of Government. If then Government can show that at any period within the 60 years the site in question was unoccupied, the burden of proof of title is shifted to the other side and if he seeks to prove title by possession, he must prove possession for the statutory period.
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> The corollary of this view of the law is that where a person attempts to prove his possession by acts of user which being trifling and commonly allowed to villagers or recent are ambiguous evidence of exclusive possession such evidence does not cast the burden of proving that the land was unoccupied upon Government.

The main question in this case appears to be whether the plaintiff has succeeded in proving the kind of possession that would justify an inference as to his title under S. 110, Evidence Act. The evidence does not show anything beyond this, that as regards the area described as part (1) out of plot Y in the learned Assistant Judge's judgment, the plaintiff has been using the open ground for tethering cattle for a number of years, and that as regards the other part of plot Y described by the learned Assistant Judge as part 2, of the said plot, there has stood a temporary otli for some years. It is admitted that there is no permanent structure on this part 2 of the plot Y. There is the further evidence that on the west and south of plot Y there are old hedges and that to the north thereof there is a hedge put up ten years ago. Nearly all the cases cited by the advocates on both sides can easily be distinguished from the present case on the ground that the facts therein are altogether different in nature from the facts of this case. In 45 Bom 789[4] as the learned Subordinate Judge has pointed out there was a Ghabhan Register with entries dating back to 1866, the suit being of the year 1919; and thus Government in that case started with a presumption in their favour and the plaintiff had to prove adverse possession. In 25 Bom 287[2] there was a house built on the land in dispute and the plaintiffs had spent a sum of Rs. 1,600 on the building. There was thus an undoubted fact of possession in favour of the plaintiffs. Similarly, in 20 I A 99[5] which was relied on in 25 Bom 287[2] the litigation related to land with premises thereon and there was no doubt as to the possession. In none of these cases was there any question of the kind of user that has been proved in this case. 40 Bom 392[1] which has been cited on behalf of the appellant, was again not a case of slight acts of user such as existed in 16 Bom 338[6] (which was distinguished) it seems, that some sort of structure was put up in this case which the Mamlatdar threatened to demolish. In 16 Bom 338[6] the point at issue was whether the user alleged amounted to adverse possession. It would thus be seen that the cases referred to above all relate to facts or issues materially different from those existing in the present case.

20 Bom 798[3] has been referred to by the learned advocate for the appellant. In that case, the plaintiff who was in possession of a certain land sued for a declaration that the defendant had no title to it and that it belonged to him. The plaintiff asserted that he had built the cattle shed on the land and had kept fodder, grain and earth on the site. The building of the cattle shed was apparently held proved, but the learned District Judge found on the evidence that the plaintiff had not proved his title. It was held that the learned District Judge was right in refusing the declaration of title, but on the authority in 20 I A 99[5] it was also held that the plaintiff was entitled to the land and the shed built thereon. Thus in this case the evidence regarding the keeping of fodder, grain and earth on the site in suit was not held to constitute such

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2. Hanmantrao v. Secretary of State, (1901) 25 Bom 287=2 Bom L R 1111.
3. Gangaram v. Secretary of State, (1896) 20 Bom 798.
4. Vasta Balwant v. Secretary of State, A I R 1921 Bom 177=61 I C 440=23 Bom L R 238 =45 Bom 789.
5. Ismail Ariff v. Mahomed Ghouse, (1893) 20 Cal 834=20 I A 99=6 Sar 305 (P C).
6. Framji Cursetji v. Goculdas Madhowji, (1892) 16 Bom 338.

possession as would justify an inference of title.

We have, therefore, to see whether on the evidence in this case the plaintiff can be found to have established anything beyond mere acts of user, and if not whether such user can constitute the kind of legal possession that would give rise to a presumption of title in his favour. There is no doubt that the oral evidence sufficiently shows that he has been using a large portion of the area in question for the purpose of tethering cattle and storing grass and, as regards one part of the site, that he has for a number of years had an otli thereon. All this, in our opinion, cannot establish anything beyond undisturbed user for a certain period. The erection of hedges to the west and south of the plot does not seem to help his case materially, because those hedges have been erected to the west and south of the existing buildings. The more recent erection of a hedge to the north of plot Y cannot, in our opinion, even when combined with the evidence of user, be sufficient to prove or to amount to legal possession. Though the defendant has not succeeded in proving what he has alleged in his written statement regarding plot Y, viz., that it has been used as a public passage, and though it appears that the defendant has made no attempt to contradict or refute the evidence led by the plaintiff as to his acts of user, it cannot be said that the plaintiff's case is strengthened by any weakness in the defendant's case. We do not think that the evidence adduced for the plaintiff and the circumstances in this case suffice to prove such possession by him as would justify an inference of his title. We, therefore, see no reason for differing from the conclusion at which the learned Assistant Judge has arrived with respect to the two parts of plot Y in regard to which he has differed from the learned Subordinate Judge. That being so, the appeal will be dismissed with costs.

As regards the cross-objections, they relate to the decree of the lower appellate Court as regards the remaining part of plot Y and plot X. As to this part of plot Y there is sufficient evidence as to the existence of a house and of old foundations therein and this has been regarded by both the Courts as sufficient evidence of exclusive possession by the plaintiff. We see no reason to take a contrary view. As to plot X, the learned Assistant Judge has on the documentary as well as on the oral evidence found the existence of a wada on the site proved and he holds that the wada is of long standing. This according to him is a "strong sign of a claim to exclusive ownership." The learned Subordinate Judge also has based his finding on the fact that there is no dividing boundary mark or fence between X and survey No. 55-A, which is plaintiff's property, and that the plot X is bounded on four sides by private properties. These grounds have, in our opinion, been rightly considered to be sufficient evidence of the plaintiff's possession. Here again, therefore, we see no reason to differ from the conclusions of the two Courts. The result, therefore, is that the cross-objections will also be dismissed with costs.

Broomfield, J.—The question in this second appeal is precisely the same as in 25 Bom 287[2] that is to say, whether the possession of the appellant-plaintiff was or was not of such a character as to place on the respondent-defendant under S. 110, Evidence Act, the burden of proving that plaintiff is not the owner of the land. The view taken by Ranade, J., which was decisive in that case, was that possession to come within the scope of S. 110 must be possession founded on a prima facie right. This has been interpreted by Fawcett, J. in 45 Bom 789[4] as meaning that the possession must be of such a character as leads to a presumption of title. I think there can be no doubt that that is what Ranade, J. meant, and, if I may say so with deference, that is the correct view. The learned Assistant Judge is quite wrong in saying that 25 Bom 287[2] is overruled by 45 Bom 789.[4] Of course the decision of one division bench cannot be overruled by another Division Bench. But the facts in 25 Bom 287[2] were quite different, and, as my learned brother has pointed out, in all the cases cited in which possession has been held sufficient prima facie proof of title the facts were much stronger than they are in the present case. We should be going further than the authorities and in my opinion further than it would be safe to go if we held that the possession proved by the plaintiff is sufficient to throw the burden of proof on the other side under S. 110. I agree that both the appeal and the cross-objections should be dismissed with costs.

K.B./A.L. *Appeal dismissed.*

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BEAUMONT, C. J. AND RANGNEKAR, J.

Shankar Govind Bhosale—Defendant—Applicant.

v.

Revashankar Purshottam Trivedi — Plaintiff — Opposite Party.

Civil Revn. No. 398 of 1935, Decided on 6th October 1936, against order of Judge, Small Cause Court, Bombay.

(a) Presidency Small Cause Courts Act (1882), Ss. 59 and 66 — Goods of tenant distrained on application by landlord for arrears of rent—Tenant wishing to get rid of distraint by complying with notice in form C under S. 59, must pay commission along with payment for item of affidavit and warrant to distrain.

"Commission" would normally mean commission for the services rendered by the officers of the Court. [P 198 C 1]

Where a tenant, to whom a distress warrant is issued for arrears of rent on the application of the landlord, has allowed his goods to be distrained upon and desires to get rid of the distress by complying with the notice in form C under S. 59, he must pay the item under the head "commission," although if he had allowed the goods to be sold, he might have received some further services without making any additional payment. The Registrar is right in declining to remove distress except on the terms of receiving payment for the items of affidavit and warrant to distrain and for the item of commission. [P 198 C 1]

(b) Practice—Small Cause Court—Landlord applying for distress warrant required to pay in advance whole cost of warrant — Practice is illegal.

The costs, in case where the landlord applies for a distress warrant, are dealt with by the Presidency Small Cause Courts Act, and the scheme is to get them either under a notice in form C from the tenant, or on a sale under S. 66. [P 198 C 2]

The practice, prevailing in the Small Cause Court in cases in which a landlord applies for a distress warrant of requiring the landlord to pay into Court in advance the whole of the sum which may become payable in respect of the costs of the warrant is illegal. [P 198 C 1, 2]

B. G. Thakor and *S. R. Mehta* — for Applicant.

K. Mc. I. Kemp and *B. G. Rao*—for the Crown.

Beaumont, C. J.—This is an application for revision of an order made by a Judge of the Small Cause Court, Bombay. The sum involved is only Rs. 1-8-0, but the application raises a question of some importance in relation to the costs of distress warrants issued by the Small Cause Court. That matter is dealt with under Ch. 8, Presidency Small Cause Courts Act 15 of 1882, and it will be convenient to deal with the Act before coming to the facts of this particular case, as to which there is no dispute. Under S. 53 any person claiming to be entitled to arrears of rent of any house or premises, to which Ch. 8 extends, may apply to any Judge of the Small Cause Court, or to the Registrar of the Small Cause Court, for a warrant as thereinafter mentioned, and the application is to be accompanied by an affidavit in the form (marked A) in Sch. 3. S. 54 provides that the Judge or Registrar may thereupon issue a warrant under his hand and seal and returnable within six days, to the effect of the form (marked B) in Sch. 3 addressed to any one of the bailiffs of the Court. S. 57 provides that in pursuance of the warrant, the bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed, or such part thereof as may, in the bailiff's judgment, be sufficient to cover the amount of the rent, together with the costs of the distress. Under S. 59 the bailiff has then to make an inventory of the property which he seizes and to give a notice in writing to the effect of the form (marked C) in Sch. 3 to the tenant. The notice in form C is important for the purposes of the present application, and it is (omitting formal parts) in these terms :

> Take notice that I have this day seized the moveable property contained in the above inventory for the sum of Rs. . . . being the amount of . . . month's rent due to *A. B.* at . . . last, and that unless you pay the amount thereof, together with the costs of this distress, within five days from the date hereof, or obtain an order from one of the Judges or the Registrar of the Small Cause Court to the contrary, the same will be appraised and sold pursuant to the provisions of Ch. 8, Presidency Small Cause Courts Act, 1882.

The real question, which calls for decision, is, what costs a tenant, who desires to comply with the terms of that notice, has to pay. He has got to pay the amount of the distress together with the costs of the distress, and the question is what items can be properly included in the costs of the distress at the stage at which the notice in the form C is given. I will return to that question after noticing the other relevant sections of the Act. S. 60 enables a tenant or any other person alleging himself to be the owner of any property seized under the Chapter, at any time within five days from such seizure, to apply to any Judge of the Small Cause Court to discharge or suspend the warrant, or to release a distrained article, and on such application, the Judge may grant relief on such terms as he thinks just, and may at his discretion deal with the costs of the application and the costs of the issue and execution of the warrant. I think, that section only applies in special cases where there is some particular reason for endeavouring to get the distress stayed. It does not, I think, apply to a normal case in which the tenant gets relief by complying with the notice in form C. S. 64 provides that in default of any order to the contrary by a Judge of the Small Cause Court, or by the High Court, any two of the bailiffs may, at the expiration of five days from a seizure of property under the Chapter, appraise the property so seized, and give the tenant notice in writing to the effect of the form (marked D) in Sch. 3. Form D (omitting formal parts) is in these terms :

> Take notice that we have appraised the moveable property seized on the . . . day of . . . . under the provisions of Ch. 8, Presidency Small Cause Courts Act 1882, of which seizure and property a notice and inventory were duly served upon you (or upon . . . on your behalf, *as the case may be*) under date the . . . and that the said property will be sold on the . . . (*two clear days at least after the date of the notice*) at . . . pursuant to the provisions of the said Act.

Then S. 65 provides that in default of an order to the contrary, the distrained property shall be sold on the day mentioned in the notice, and the bailiffs shall, on realising the proceeds, pay over the amount thereof to the Registrar of the Small Cause Court; and such amount shall be applied first in payment of the costs of the said distress and then in satisfaction of the debt ; and the surplus, if any, shall be returned to the tenant. Then S. 66 provides that no costs of any distress under the Chapter shall be taken or demanded except those mentioned in the part (marked E) of Sch. 3. Form E of Sch. 3 consists of five columns. The first column is headed "Sums sued for" ; the second column is headed "Affidavit and warrant to distrain" ; the third column is "Order to sell" ; the fourth column is "Commission" ; and the fifth column is "Total." In the present case the amount of distress is Rs. 10 ; the amount payable under the second column in respect of affidavit and warrant to distrain is therefore Re. 0-8-0 ; the amount payable under the third column "Order to sell", (which order was never made), is Re. 0-8-0 ; and the amount payable under the fourth column "Commission" is Rs. 1-8-0. Now, the question is whether, in the circumstances of this case, the tenant was bound to pay the commission of Rs. 1-8-0. It is admitted that he is liable to pay Re. 0-8-0 for the affidavit and warrant to distrain, and that he is not liable to pay Re. 0-8-0 for the order to sell. The only question relates to the commission.

The facts are that the landlord applied on 14th February 1935 for a distress warrant, which was duly issued, and on 15th February 1935, the tenant tendered to the Registrar Rs. 10-8-0, that is the amount of the rent claimed, and Re. 0-8-0 for the affidavit and warrant to distrain, and claimed to have the distress released. The Registrar declined to release the distress, except on payment of Rs. 12, that is the amount tendered by the tenant plus Rs. 1-8-0 for the commission. Thereupon, the tenant made an application, which, he states, was made under S. 60, Small Cause Courts Act, and the judgment purports to be given under S. 60. If the application was really made under S. 60, the amount which the tenant had to pay was in the discretion of the Judge, but the Judge does not seem to have dealt with the application as one under S. 60. He seems to have been of opinion that he had no discretion to decide whether the tenant was bound to pay Rs. 1-8-0 or not, but treated the matter as one of law, as it would be if the tenant was seeking relief by compliance with a notice in form C, and we will deal with the matter on that basis.

As I have said, the real question is, whether the commission falls within the costs of the distress payable under a notice in form C. It is to be noticed that the column "Commission" follows immediately after the column headed "Order to sell", and it is accordingly argued that the commission is really a commission on sale, and the commission is not payable unless a sale takes effect. The commission, however, is not based on the amount obtained on sale, but is based on the amount claimed, for in the last item, where the amount sued for is Rs. 100 or over the commission is seven per cent. that is seven per cent. on the amount sued for, and not seven per cent. on the amount recovered on sale. If we hold that the commission is only payable on sale, then undoubtedly some services, which are required to be rendered in respect of distress warrants, where no sale takes place, are not paid for. Before a notice in form C is served, the bailiff has to go to the premises, to distrain the goods, to make an inventory of them, and to give notice to the tenant of that inventory and of the tenant's right to pay off the distress, and it seems unlikely that it was intended that nothing should be payable for those services. On the other hand, on the view contended for by the learned Advocate-General, namely that the commission is a lump sum, which is payable at any stage at which the distress is terminated, the tenant has to pay the same amount for commission when he pays off the distress on receiving a notice in form C, as he would have to pay after the bailiffs have appraised the property and served a further notice under form D and sold the property. The Legislature not having split up the commission, we have to decide which of the two rival views ought to prevail, and it seems to me that the view of the learned Advocate-General is right. The column is not headed "Commission on sale", but is headed simply "Commission", which, I think, would normally mean commission for services rendered by the officer of the Court. Where a tenant has allowed his goods to be distrained upon and desires to get rid of the distress by complying with a notice in form C, I do not see anything unreasonable in holding that he must pay the item under the head "Commission," although if he had allowed the goods to be sold he might have received some further services without making any additional payment. In my view, treating this as a case in which a tenant complies with a notice in form C, the Registrar was right in declining to remove the distress except on the terms of receiving payment for the item of affidavit and warrant to distrain and for the item of commission.

I gather from the judgment of the learned Judge that the practice prevails in the Small Cause Court in cases in which a landlord applies for a distress warrant of requiring the landlord to pay into Court in advance the whole of the sums which may become payable in respect of the costs of the warrant, and that until recently it was the practice of the Court, where the distress was released without a sale, to refund half the amount paid by the landlord; and that this practice of refunding has been recently discontinued. As far as I can see, there is no justification for requiring payment of the costs in advance by the landlord. The costs are dealt with by the Act, and the scheme is to get them either under a notice in form C from the tenant, or on a sale under S. 66, and the practice of requiring the landlord to pay them in advance seems to me to be illegal. Of course, the landlord necessarily has to pay for the costs of his own affidavit, and no doubt he gets these back from the Court, if and when the Court recovers the costs from the tenant, or on a sale.

Rangnekar, J.—I agree and have nothing to add.

V.B.B./D.S. *Order accordingly.*

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RANGNEKAR, J.

Dharwar Urban Bank, Ltd. and *another*—Appellants.

v.

Krishnarao Anantrao Konur — Respdt.

Second Appeals Nos. 362 and 485 of 1934, Decided on 25th August 1936.

(a) Bombay Land Revenue Code (5 of 1879), Ss. 31 (2), 57 and 165—Forfeiture of land for non-payment of revenue – Private sale of same land by Collector — Purchase by Revenue Officer benami through defaulter's wife without permission of Government—Purchase is in contravention of S. 31 (2) and therefore illegal.

It is clear upon the language of the Cl. (2), S. 31 that there is nothing in the language itself which would limit the purchase prohibited to a public sale, except the words which refer to "bid . . . . for any property" and except the marginal note. The section itself does not particularly refer to a purchase at a public sale or a private sale and makes no distinction of that character. Having regard, therefore, to the spirit and the letter of the section read as a whole the section prohibits Revenue Officers from being directly or indirectly concerned in any of the transactions or acts set out in the section. [P 201 C 1, 2]

Where, therefore certain lands were forfeited by Government for non-payment of land revenue but were sold by private sale by the Collector and purchased by a Revenue Officer benami through the defaulter's wife without permission of the Collector or Government:

Held: that the purchase was in contravention of S. 31 (2) and therefore illegal. [P 201 C 2]

(b) Interpretation of Statutes — Marginal notes.

The marginal notes cannot be referred to or used for the purpose of construing the sections of the statutes: *26 All 393 (P C), Foll.* [P 202 C 1]

H. B. Gumaste (in Appeal No. 362 of 1934) and *G. P. Murdeshwar* (in Appeal No. 485 of 1934)—for Appellants.

S. B. Jathar, R. A. Jahagirdar and *A. S. Katti*—for Respondents.

Judgment. — These are two appeals, which arise in certain insolvency proceedings; and the facts, so far as they are material, may be briefly stated as follows: One Raghavendra Peerjabade was adjudicated an insolvent in 1932 on his own petition under the provisions of the Provincial Insolvency Act (Bom. 5 of 1920). A receiver was appointed, and the receiver in the discharge of his duty to realize the property of the insolvent took possession of three survey lands Nos. 95, 146 and 148 on 14th February 1933. These lands were in the village Hallikeri, taluka Dharwar. Three days after this, respondent 1 put in an application objecting to the receiver's possession and contending that he was the owner of the lands in question. He is described in the proceedings as an obstructor. This application was made under S. 68, Provincial Insolvency Act. The facts on which he relied were, that the insolvent, who was originally a registered occupant of these lands, had made a default in paying the land revenue in respect of them, and the lands were, therefore, forfeited to Government. He alleged that Government conveyed these lands to Godubai, wife of the insolvent, for an occupancy price of twice the amount of assessment, but that the consideration came from him, and Godubai, who was his brother's daughter, was merely his benamidar and that he was managing the lands on behalf of Godubai. It is not in dispute that the respondent at this time was Mamlatdar of Kalghatgi, a neighbouring village in the same district.

The receiver's claim was based upon the allegation that Godubai was a registered occupant of the lands, that she died after Raghavendra Peerjabade was adjudicated insolvent and he succeeded to her property as her heir, and these lands, therefore, vested in the receiver under the provisions of the Act. The receiver denied that Godubai was a benamidar for the applicant, and contended that if she was, the transaction was illegal, and no interest passed to the applicant as at the time of the transaction he was a Mamlatdar of a neighbouring village in the same district and had purchased the property without the express permission of the Government or of the Collector to whom he was subordinate, under the provisions of S. 31, Bombay Land Revenue Code (Bom. 5 of 1879). On these contentions the learned First Class Subordinate Judge at Dharwar raised two issues: (1) whether the alleged benami purchase was proved; and (2) whether it was legal. On the first question, the learned Judge found the issue in the affirmative. On the second question, he held that the transaction was legal. In his opinion, the transaction did not fall within the prohibition laid down in S. 31, Bombay Land Revenue Code; and, dealing with sub-s. (2) of that section, which was the only material clause, he was of opinion that it applied to purchases made by Revenue Officers at a public sale, and that in this case there was no public sale because what happened was that on the forfeiture of the lands Godubai after some time applied to the revenue authorities for the same being sold to her, and the Collector sold them to her privately. He supported his opinion by a reference to the marginal note of that sub-section, which is in these words: "Not to purchase at public sale." In the result, he allowed the application and declared that the lands were the property of the applicant.

There were two appeals from this decision made by two creditors to the District Court of Dharwar. The learned District Judge agreed with the First Class Subordinate Judge on both the questions and dismissed the appeals. From that order of dismissal these two appeals are brought to this Court. It may be stated that the receiver was also a party to this application, and in the appeals he supports these creditors. From the facts to which I have referred, it is clear that the result of these appeals must depend upon the construction of S. 31 read with some other relevant sections of the Bombay Land Revenue Code. But before I turn to the provisions of the Code, I shall briefly dispose of one of the points taken on behalf of the respondent-applicant. It is argued by Mr. Jathar on his behalf that there being concurrent findings on the question as to Godubai being a benamidar for the applicant, the question as to the legality of the transaction, by which the applicant claimed to be the owner of the lands, is not relevant and does not arise. He says that the receiver's title depends upon the title of Godubai. That, no doubt, is true. But he further says that Godubai having now been found to have no title, the receiver cannot put forward any claim to these lands, particularly as against his client who has been declared to be the owner and who has been in possession of these properties. In my opinion, that is not the proper view to take of the matter. In the first place, there is no finding that at the date of the application the applicant was in possession of the lands. On the other hand, the finding is that he was managing the lands on behalf of Godubai. Then, the receiver admittedly had taken possession of the land before the application, and it was with a view to object to that possession and to establish his own claim that the applicant came to the Court under S. 68, Provincial Insolvency Act. The question, then, must arise, whether the applicant succeeded in establishing his case, his case being that he was the owner of the lands as he had purchased them ; that the lands did not belong to Godubai; and that therefore, the possession taken by the receiver was wrongful and should be restored to him. I think, therefore, both the Courts below were right in proceeding upon this footing to consider not only as to whether the transaction was a benami transaction, but whether it was such a valid benami transaction as could be established in a Court of law by the applicant. S. 31, Bombay Land Revenue Code is in Ch. 4, the heading of which is "of Certain Acts prohibited to Revenue Officers, and of their Punishment for Misconduct." It enumerates the acts prohibited in several subsections. The principal part of the section is in these terms:

> *31.* No revenue officer shall, except with the express permission of Government, or of the Collector, or Superintendent of Survey to whom he is subordinate . . . .

Sub-section (1) prohibits revenue officers directly or indirectly from trading. Sub-s. (2) is in the terms following:

> (2) purchase or bid either in person or by agent, or in his own name or in the name of another, or jointly or in shares with others, for any property which may under the provisions of this Act or of any other law for the time being in force be sold by order of any revenue or judicial authority in the district in which such officer is at the time employed.

Sub-s. (3) prohibits revenue officers from being concerned directly or indirectly on their private account in the collection of revenue. Sub-s. (4) prohibits revenue officers from making private use of any public money or property; and sub-s. (5) prohibits them from demanding or receiving any undue exactions or even presents. It is common ground that the only sub-section which would be applicable if at all is sub-s. (2). The question is, whether, as has been held by the lower Courts, this sub-section prohibits only purchases made by a revenue officer in contravention of S. 31 at a public sale, or whether it is wide enough to embrace purchases of Government lands at a private sale. The other relevant sections may now be referred to. One is S. 56, which declares that land revenue shall be a paramount charge on the holding, and upon failure in payment of it the holding is liable to forfeiture. It then provides that when forfeiture is incurred, the Collector may levy all sums in arrears by "sale of the occupancy . . . . or may otherwise dispose of such occupancy . . . . " under rules made under S. 214, and thereupon the transferee would get the lands freed from all rights and equities existing in favour of any person other than Government. S. 57 authorizes the Collector on forfeiture of the holding to resume possession and to place the purchaser or transferee in possession of the holding. The other section is S. 153, which is in these words:

> *153.* The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of Ss. 56 and 57, and credit the proceeds, if any, to the defaulter's accounts : Provided that the Collector shall not declare any such occupancy or alienated holding to be forfeited : (a) unless previously thereto he shall have issued a proclamation and written notice of the intended declaration in the manner prescribed by Ss. 165 and 166 for sales of immoveable property ; and (b) until after the expiration of at least fifteen days from the latest date on which any of the said notices shall have been affixed as required by S. 166.

It is clear from these sections that, where there has been a failure to pay land revenue due in respect of any occupancy lands, there is a forfeiture of the occupancy tenure to Government, and it is open to the Collector on such forfeiture to sell the lands to another person or to restore them to the defaulter or to transfer them to another person. There is nothing in the section or in the rules to suggest that in such cases the sale must necessarily be a public sale. On the other hand it is fairly conceded,—and that is clear from the Code as well as the rules—that in such cases it is open to the Collector to sell the lands privately.

In my opinion, therefore, to start with, there is no justification for the assumption made by the learned District Judge that the section prohibits purchase at sales by auction only. The Code as well as the rules made under it clearly provide for a private sale as well as a public sale; and where a public sale is to be held, then the procedure laid down in S. 165 and the sections following, has to be followed. S. 165 provides that a proclamation has to be issued; then the proclamation has to be made by beat of drum; then a written notice of the intended sale has to be affixed in certain public places. In other words, all steps to make the sale as widely known to the public as possible have to be taken by the Collector. I have referred to sub-s. (2) of S. 31. It is conceded—and it is also clear upon the language of the clause—that there is nothing in the language itself which would limit the purchase prohibited to a public sale, except the words which refer to "bid .... for any property," and except the marginal note. The section itself does not particularly refer to a purchase at a public sale or a private sale and makes no distinction of that character. It undoubtedly refers to and prohibits bidding either directly or indirectly by a revenue officer at a sale in regard to property ordered to be sold by a revenue authority. Merely prohibiting a bidding of this nature does not restrict the prohibition to a purchase at a public sale only. A bidding does not result in a sale until the bidding is accepted and the bidder is declared to be the highest bidder. In my view, these words really tend to show that the Legislature wanted to impose a very strict rule of prohibition in regard to such transactions on all revenue officers in the district in which such transactions would take place; and so the clause prohibits not only a purchase but even an act much short of a purchase, such as bidding, which, as I have said, will not amount to a purchase until something more happens; and the intention of the Legislature to impose such a strict rule of conduct, which no authority is needed to support, in the interests of the public and for the purposes of good government, is clear from the other clauses of the section, to some of which I have already referred. If the view taken by the lower Courts and supported here is correct, the position would be absurd, as a revenue officer can purchase lands forfeited at a private sale held by the Collector but not at a public sale.

It seems to me, therefore, having regard to the spirit and the letter of the section read as a whole, that it was never intended to put such a narrow construction on sub-s. (2) as seems to have found favour with the learned Judges in the Courts below. In my opinion, the section prohibits revenue officers from being directly or indirectly concerned in any of the transactions or acts set out in the section and that is the substance of the matter, and the facts in this case clearly bring the transaction within the prohibition under the section. This is clear from Ex. 54, which shows that lands were forfeited, and then an application was made by the wife of the insolvent. It was, therefore, held that under the rules, the lands could not be restored, the applicant being other than the defaulter. It was considered that a public sale would not be advantageous, and therefore, the Collector stated as follows:

> Considering that all arrears have now been paid, I order that, as a special case, the lands be sold to the defaulter's wife at the pancha estimate, i. e., for an occupancy price equal to twice the assessment.

The property, therefore, was sold by order of the Collector, who was a revenue officer in the district in which the present applicant was admittedly employed at the time, and it is difficult to see why this transaction does not come within the prohibition laid down by sub-s. (2). The learned First Class Subordinate Judge was impressed—and, I may say, not unduly—by the marginal note which I have set out above; and the question arises as to whether such marginal notes can be referred to in considering the sections of a statute, and, if so, to what extent. This question was considered by me in a Full Bench decision in 35 Bom L R 886[1] at p. 894. I was not prepared to express a definite opinion on the point, but I felt that a marginal note could be looked at for the purpose of construing a statute. I relied upon 51 All 411.[2] I also relied upon a passage in Maxwell on Interpretation of Statutes, Edn. 7, at p. 37, which is in these terms:

> But, as regards marginal notes, the rule regarding their rejection for the purposes of interpretation is now of imperfect obligation.

There are decisions of this Court where it has been (if I may say so, respectfully) somewhat loosely held that marginal notes can be relied upon for the purpose of construing a statute or the sections of a statute. Mr. Gumaste refers to 31 I A 132.[3] Their Lordships in that case observed as follows (pp. 142, 143) :

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[1] Emperor v. Ismail Sayadsaheb, A I R 1933 Bom 417=1933 Cr C 1289=146 I C 248=34 Cr L J 1239=35 Bom L R 886=57 Bom 537 (F B).

[2] Ram Saran Das v. Bhagwat Prasad, A I R 1929 All 53=113 I C 442=1929 A L J 290=51 All 411 (S B).

> It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament.

I have referred to Maxwell on Interpretation of Statutes, which clearly lays down a contrary proposition. Apart from authority, it seems to me to be plain on principle that there is no reason why, when a Court is unable to collect the precise intention of Legislature in regard to any particular part of a statute or a section of a statute, it cannot call in aid marginal notes or headings or the scheme of the Act or the place in which the section occurs. Where, however, the language is clear and the meaning plain, these aids cannot be used to control the plain meaning of the language in the section; but where that is not the case they can be availed of—and often have been by eminent authorities from ancient times — as extraneous aids to the construction of a statute. I think the true rule is one which was laid down by Collins M. R., in (1904) 73 L J K B 1005[4] in which the Master of Rolls observed as follows (p. 1007) :

> The side-note, also, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section.

In this country we are bound by the decisions of the Privy Council. No other decisions of their Lordships of the Privy Council have been referred to on the point; and I am, therefore, unable to hold that marginal notes can be referred to or used for the purpose of construing the sections of a statute. A somewhat similar question arose before my brother Baker and myself in 35 Bom L R 404.[5] There the question was with reference to the construction of the old S. 33, Bombay District Police Act, 1890. Both the lower Courts have distinguished that case, and the principle laid down there, from the present case upon the ground that there is a fundamental difference between the terms of the old S. 33, Bombay District Police Act and S. 31, Bombay Land Revenue Code. Some distinction is undoubtedly apparent; but it seems to me that the principle aimed at by both the sections is the principle which, after all, one finds very clearly summed up in S. 23, Contract Act. The old S. 33, Bombay District Police Act, is in these terms :

> No Police Officer shall engage in trade or be in any way concerned either as principal or agent, in the purchase or sale of land within the district wherein he is employed or in any commercial transaction whatever without the permission of the Magistrate of the District or of Government.

That section implies exactly the same prohibition, which is implied by the terms of S. 31, Bombay Land Revenue Code in these terms :

> (2) purchase or bid either in person or by agent, or in his own name or in the name of another, or jointly or in shares with others, for any property . . .

In my opinion, the purchase by the respondent was in contravention of S. 31 (2). His title, therefore, failed. In the result, therefore, the appeals must be allowed, the orders made by the lower Courts set aside, and the application of the respondent rejected with costs throughout. There will be separate sets of costs—one set of costs for the receiver, and one set of costs for the appellant in each appeal.

S.C./D.S. *Appeals allowed.*

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[3] Thakurain Balraj Kunwar v. Rae Jagatpal Singh, (1904) 26 All 393=31 I A 132=7 O C 248=8 Sar 639 (P C).

[4] Bushell v. Hammond, (1904) 2 K B 563=73 L J K B 1005=91 L T 1=52 W R 453=68 J P 370=20 T L R 413.

[5] Sundrabai v. Manohar Dhondu, A I R 1933 Bom 262=144 I C 781=35 Bom L R 404.

A. I. R. 1937 Bombay 202

RANGNEKAR, AG. C. J. AND TYABJI, J.

Dattatraya Digambar Panchwadkar and *others*—Defendants—Appellants.

v.

Prabhakar Ramkrishna Panchwadkar and *another*—Plaintiffs—Respondents.

Appeals Nos. 197 and 222 of 1933, Decided on 15th July 1936, against decision of First Class, Sub-Judge, Sholapur, in C. S. No. 609 of 1931.

(a) Hindu Law— Partition — Essentials— Unequivocal intention to separate and not writing is essential—Institution of suit for partition is evidence of intention to separate and effects partition unless such suit is withdrawn before trial and parties agree to continue to be joint.

To effect a partition, all that is necessary is a clear and unequivocal intention on the part of the co-parceners to sever their joint status and to hold their shares in severalty. No writing is necessary, and the intention may be proved by evidence of surrounding circumstances, and particularly conduct of the parties and their dealings *inter se* after the alleged partition. It is equally well established that a suit instituted by one co-parcener for partition against his other co-parceners effects severance among them, and would be strong evidence of the intention of the parties to sever, unless the suit is withdrawn before the trial and not proceeded with, and the parties agree to continue to be joint as before. [P 204 C 2; P 205 C 1]

(b) Hindu Law — Partition — Place of worship— Whole building not dedicated to idol—Building is partible.

Ordinarily according to the old Hindu law a place of worship is indivisible. Modern custom, however, as established by the decisions of the Court has sanctioned such partition as can be had of such property, generally by means of a performance of the duties of the office and the enjoyment of the emoluments by the co-parceners in rotation. This, of course, would apply to such portion of the building as is exclusively set apart for the idol and its worship. But where the rest of the building is treated like any other joint property, rented or let out to others or used by members for their residence, there can be no objection to partition it among the co-parceners, if it can be done without destroying the intrinsic value of it. [P 205 C 2; P 206 C 1]

In a partition suit a question arose whether a place of worship is partible, the building as a whole not being dedicated to the idol :

Held : that in the absence of dedication of the building for the worship of the family idol, the building could not be excluded from partition merely because it was used for the idol. [P 206 C 1]

(c) Hindu Law— Primogeniture — Normal state of Hindu family is joint and primogeniture depends upon usage or nature of estates —If a party sets case of primogeniture, burden lies upon him to prove a family custom to that effect.

Primogeniture is the prerogative enjoyed by the eldest son, through law and custom, to succeed to his ancestor's inheritance in preference to his younger childern. The normal state of a Hindu family is joint, and primogeniture depends upon usage or in some cases on the nature of the estate. In cases of big zamindaries and what are known as Raj, the burden of proving that they passed by primogeniture is comparatively easy to discharge, but in other cases the burden is on the party who sets up the case of primogeniture, to prove that there is family custom by which the eldest son succeeds to the exclusion of the younger. [P 206 C 2]

(d) Hindu Law — Joint family—Right to perform service and worship of idol is co-parcenary property incapable of being partitioned by metes and bounds.

The right to perform the service and worship of the idol is classed by Hindu law-givers as co-parcenary property and there is no distinction between it and any other ordinary joint family immovable property except that the former is incapable of being partitioned by metes and bounds. [P 207 C 1]

(e) Limitation Act (1908), Arts. 127 and 144 —Claim for joint possession or enjoyment by rotation—Art. 127 applies and not Art. 144.

When the claim as to either joint possession or enjoyment by turns or rotation is made, the case stands in the same way as a claim to immovable property, and the Article applicable is Art. 127 and not Art. 144, Limitation Act. [P 207 C 1]

(f) Hindu Law—Partition—Equities arising between co-parceners by reason of separate holding or alienation have to be enforced.

In effecting partition between co-parceners, all equities arising between them by reason of their separate holding or alienations and other circumstances have to be enforced and partition should be made subject to such equities. [P 207 C 2]

H. C. Coyajee and *S. Y. Abhyankar*—for Appellants.

D. A. Tuljapurkar and *S. A. Kher*—for Respondents Nos. 1, 2, 8 and 9.

Rangnekar, Ag. C. J.—These are two appeals in a suit for partition brought by two members of a joint and undivided Hindu family against the other members of the family, some of whom supported the plaintiffs, the principal contesting parties being the two plaintiffs and defendants 1 and 2. The relationship between the parties appears from a pedigree of the family, which is printed at p. 1 of the print. It appears from it that the common ancestor was one Raghunathboa. He had three sons—Balkrishnaboa, Gopalboa and Gvindboa—and it is common ground that they died somewhere in 1903. The eldest brother Balkrishnaboa had two sons—(1) Digambar, who was defendant 1, who is now dead, and his son Dattatraya, being defendant 2, and (2) Narayan whose heirs are defendants 3 to 7. Gopalboa died without any issue. Govindboa left him surviving three sons—Ramkrishna, Hari and Wasudev. Ramkrishna died in 1924, and the two plaintiffs are his sons. Hari is defendant 8, and his son defendant 9. Wasudev died in 1923 leaving a widow who is not a party to this suit. Originally the family was joint and possessed of joint family property.

The plaintiffs claimed one-fourth share in the properties mentioned in the suit. Among those properties, there is one which in the record is described as the Harimandir. As regards this particular property, the plaintiffs claimed a partition of a part of the property, the other part being excluded from their claim to partition consisting of eighteen compartments which were utilized for housing the family idol. Then they claimed that they had a one-fourth share in the daily and occasional observances and services pertaining to the temple, such as *bhajan*, *puja*, *kirtan*, etc., and that they were entitled to receive the income according to their share. Then the plaintiffs claimed their share in the income of a jahagir granted to their family by H. E H. the Nizam known as the Aliabad jahagir, and asked for an account of the income which, they alleged had been received by defendants 1 and 2, and in regard to which their own share had not been handed over to them. There was a prayer for an injunction restraining defendants 1 and 2 from obstructing the plaintiffs in the joint 'vahivat' of the temple.

The main defence to the suit was that owing to disputes in the family the branch of Balkrishnaboa separated from the members of the other branches in the year 1904, and that a partition had taken place between them, each of the branches being in separate and exclusive possession of the properties taken by them. As regards the Harimandir, defendants 1 and 2 pleaded that it was 'devasthan' property and impartible, and the property was to be enjoyed by the eldest member of the senior branch by primogeniture. They denied, therefore, the alleged claim of the plaintiffs to share in the service of the deity, and alternatively pleaded that the claim to it was barred by the law of limitation. As regards the Aliabad jahagir and its income, defendants 1 and 2 pleaded that the Court had no jurisdiction to entertain the suit relating to the same. The other defendants, as I have said, supported the plaintiffs, including the sons of Narayan, who was the brother of defendant 1.

On these pleadings, the learned First Class Subordinate Judge of Sholapur raised various issues. He held that the defendants had failed to prove the alleged partition in 1904, and he awarded the plaintiffs' claim as regards the partition of all the properties excepting the portion used for the worship of the family deity, as to which the plaintiffs themselves had not claimed any partition. Then the learned Judge further held that, that portion comprising eighteen compartments was impartible. On the question of jurisdiction his finding was against the plaintiffs and in favour of the contesting defendants. He also held that defendants 1 and 2 had succeeded in proving that one-third of the income of the jahagir was to be reserved for the temple, one-third went to the senior branch and only one-third was liable to division among the rest of the family. This, on the face of it, seems to be somewhat unintelligible, having regard to his finding on the question of jurisdiction. On that issue, the learned Judge's finding was that the Court had no jurisdiction to try questions relating to the Aliabad jahagir. (After discussing certain facts his Lordship proceeded further.) It appears from the facts proved in the trial Court that until 1904 the family was joint. In November 1917 Ramkrishna, the father of the plaintiffs, and Hari and Wasudev, their uncles, brought a suit for partition in the Second Class Subordinate Judge's Court at Pandharpur against defendants 1 and 2. In their plaint they alleged that in November 1915 they had demanded their shares from the defendants, but the latter refused to agree to partition the property and to give them their shares. This is suit No. 56 of 1917. The Court held that it had no jurisdiction to try the suit and returned the plaint for presentation to the proper Court. The plaintiffs in that case, however, did not present the plaint to the Sholapur Court until July 1927. The plaint was then presented by Hari, Ramkrishna and Wasudev apparently having died in the meanwhile. This suit, however, was not proceeded with and was ultimately dismissed as having abated. The present suit was filed in 1929, and it was alleged in the plaint that the cause of action accrued in April 1921, when a share was demanded and refused.

The family being joint and possessed of ancestral property, ordinarily the burden would lie upon defendants 1 and 2 to prove that there was a partition in the family in the year 1904. For this purpose the defendants led both oral and documentary evidence. The learned Judge rejected their contentions and held that the parties were joint and had continued joint. The learned counsel on behalf of the appellants has drawn our attention to some of the important facts on which his clients rely, and the only question before us on this part of the case is whether upon the facts the inference drawn by the learned Judge was a just inference or not.

Before dealing with these facts, it is necessary to consider the legal position which arose on the pleadings. It is well established now that to effect a partition all that is necessary is a clear and unequivocal intention on the part of the coparceners to sever their joint status and to hold their shares in severalty. No writing is necessary, and the intention may be proved by evidence of surrounding circumstances, and particularly conduct of the parties and their dealings *inter se* after the alleged partition. It is equally well established that a suit instituted by one co-parcener for partition against his other co-parceners effects severance among them, and would be strong evidence of the intention of the parties to sever, unless the suit is withdrawn before the trial and not proceeded with, and the parties agree to continue to be joint as before. In suit No. 56 of 1917 the plaintiffs alleged that they had demanded a share in November 1915, and it was refused. Clearly Art. 127, Limitation Act, would apply to the case, and the separate possession of the other co-parceners who had refused to give a share to the plaintiffs would amount to an ouster to the knowledge of the plaintiffs from that date. But it is also clear that even after a suit for partition it is open to the co-parceners to drop the proceedings and to agree to continue joint as between themselves as before. That is the case made out on behalf of the plaintiffs. That being so, the burden, I think, would clearly rest upon the plaintiffs to prove that after the institution of the suit there was no change in the status of the family ; that the family continued to be joint, as before ; and that there was no separate interest in it. (His Lordship then discussed evidence and then proceeded further.) We are satisfied that there was no partition in 1904, nor in 1906, and that even after the suit of 1917 the parties continued to live in the same way as before and were undivided, and that the claim of the plaintiffs as regards partition must be accepted. That is the view which the learned Judge has taken, who had the witnesses before him, and we see no reason to differ from him on this point.

There is one more point in the defendants' appeal with regard to a building known as Harimandir. The plaintiffs in their plaint did not claim partition of a part of the Harimandir, and, according to them, the portion which they did not want to be divided consisted of eighteen compartments. As regards the rest of the building, which consisted of one or two storeys, they claimed that they were entitled to equal partition. The learned Judge accepted that claim. The appellants say that, that decision is wrong It is argued that the house is one and there is no warrant for the description of the house given by the plaintiffs in their plaint, as consisting of part No. 1 and part No. 2, and that the house is registered in the Municipal Records and in Government Records as one building, and that it is the house in which the temple is situate and, therefore, the learned Judge was wrong in allowing partition with regard to the whole of the building with the exception of eighteen compartments. It is also said that in the earlier suit no such distinction was made by the plaintiffs and that the distinction now made is imaginary. In the old suit, however, the plaintiffs claimed partition of the whole of the Harimandir, including the eighteen compartments, as to which they now did not seek any partition. The probabilities seem to us to be that the plaintiffs in this suit thought that they should allow these eighteen compartments, which were actually used for the idol and its worship, to remain joint out of religious or sentimental considerations. In any case no point about this was specifically made in the plaintiff's cross-examination. Their object seems to be that this portion which consists of the *gabhara* and the space in front of it, or adjoining thereto, should be kept as a place of worship for the joint enjoyment of not only the co-parceners but also the public who frequented it.

The question now is, whether the Judge was right in allowing partition of the Harimandir. It appears from the evidence that the grandfather of defendant 1 established the idol in this place; and, according to the admission of defendant 1 himself, some samadhis are also situate there. Ordinarily, according to the old Hindu Law (Manu, Ch. 9, Verse 19) a place of worship is indivisible. Modern custom, however, as established by decisions of the Court to which it is unnecessary to refer, has sanctioned such partition as can be had of such property, generally by means of a performance of the duties of the office and the enjoyment of the emoluments by the co-parceners in rotation. This, of course, would apply to such portion of the building as is exclusively set apart for the idol and its worship. But where the rest of the building is treated like any other joint property, rented or let out to others or used by members for their residence as in this case, there can be no objection to partition it among the co-parceners, if it can be done without destroying the intrinsic value of it. In this case there was no suggestion—and this is conceded by Mr. Coyajee—that the building as a whole was dedicated to the idol. That being so, it must follow that if the building is an ancestral building, it is clearly partible. In the absence of dedication of the building for the worship of the family idol, the building cannot be excluded from partition merely because it is used for the idol. The Court may, however, give an option to a co-parcener, willing to maintain the building as a place of worship, to buy it at a valuation. But that is not the case here, and I think the learned Judge was right in holding that the building was partible. As to the order he made that it should be partitioned by metes and bounds I shall have to say something when I come to the decree to be made in this case.

This leaves in the defendants' appeal the question of limitation as regards the claim for partition of joint family properties. It is difficult, in my opinion, to see where the bar of limitation arises in this case. It is true that it was alleged in the earlier suit that a demand for partition was made in 1915 and was met with a refusal. But if the conclusion to which we have come on the evidence is correct, then it must follow that for long afterwards the status of the family was joint and the property continued to be a joint family property, and there is no evidence of any exclusion or ouster to the knowledge of the plaintiffs as regards their share in the family properties. The learned counsel, however, did not seriously press this question. Upon the whole, therefore, I think the view taken by the learned Judge on the main question is correct, and to that extent his decision must be confirmed; but I think, in the circumstances of the case, the decree will have to be varied in one or two particulars.

Before doing so, it would be convenient to deal with the plaintiffs' appeal which is confined to the rejection of their claim as to right of service. As already stated, defendants 1 and 2 pleaded that the plaintiffs had no right to share in the worship and service of the idol or to share in any of the other observances, such as *puja*, *kirtan* and so on, and that defendant 1 as the son of the eldest son of the founder had alone that right by primogeniture. The learned Judge has dealt with this question in a manner which, with all respect to him, is not very happy or not easy to follow. Thus he speaks of "primogeniture of Harimandir." It is difficult to understand what is meant by primogeniture of a building or a temple. Primogeniture is the prerogative enjoyed by the eldest son, through law or custom, to succeed to his ancestor's inheritance in preference to his younger children. The normal state of a Hindu family is joint, and primogeniture depends upon usage or in some cases on the nature of the estate. In cases of big zamindaries and what are known as Raj, the burden of proving that they passed by primogeniture is comparatively easy to discharge, but in other cases the burden is on the party who sets up the case of primogeniture, to prove that there is a family custom by which the eldest son succeeds to the exclusion of the younger. The whole evidence in the case is that an idol was installed by the grandfather of defendant 1, and that is all. No custom is pleaded; no grant is alleged; and it is difficult to see where the right to take by primogeniture arises in this case. I have already pointed out that, having regard to the circumstances which brought into existence this particular deity, the right to worship the deity would be a right common to the heirs of the first founder. That being so, the view taken by the learned Judge that "primogeniture of Harimandir"—whatever that may mean—is established by adverse possession is clearly untenable.

The learned counsel for the appellant, however, argued that whatever the origin of the deity may be, the right to worship and take part in the service of the deity being of the nature of *nibandha*, that is immoveable property, is barred either under Art. 127 or under Art. 144, Lim. Act, as, to the knowledge of the plaintiffs and their ancestors time and again the right was denied, and, on the other hand, the exclusive right of the eldest member to do the service and to do all other acts pertaining to the deity was asserted. There is no clear authority that the right to perform the service and worship of an idol is *nibandha*. Vijnaneshwara does not define *nibandha*, but describes it as "So many leaves receivable from a plantation of betel, pepper or so many nuts from an orchard of areca." But whatever its nature, the Hindu law-givers certainly class it as co-parcenary property. According to Yajnavalkya, it can only be created by a King. According to Viramitrodaya it is a kind of *vritti*. Accordingly it was held in 34 Bom 349[1] that a cash allowance payable annually from the revenues of a temple was a *nibandha* and of the nature of immoveable property. There is authority in our Court to show that a *vritti* or the right to perform religious ceremonies and to receive the perquisites of that office is *nibandha*: *see* 14 Bom 167.[2] The right claimed in this case seems to me to approximate to a *vritti*. But taking the right to be a *nibandha*, there does not seem to be any distinction between it and any other ordinary joint family immoveable property, except perhaps, as to the capability of being partitioned by metes and bounds. Obviously such right is incapable of being partitioned by metes and bounds.

I am, however, clear that when the claim as to either joint pessession or enjoyment by turns or rotation is made, the case must stand in the same way as a claim to immoveable property, and the article applicable in my opinion would be Art. 127, Lim. Act rather than Art. 144. The defendant must, therefore, prove either ouster to the knowledge of the plaintiffs or their ancestors for the statutory period, or adverse possession. If I am right in holding that the idol was installed by the grandfather, then, I think, the defendants will have to prove that the case comes under Art. 127, Lim. Act, rather than under Art. 144. There is no evidence in my opinion, of any such exclusion or ouster. Therefore, assuming that it was the defendants alone who carried on the worship or took part in the service of the deity, that in my opinion would not be sufficient to amount to an ouster, once it is realized that in this respect this particular species of property stands on the same footing as any other joint family property. I may refer here to what Mayne on Hindu Law says (at p. 674): "Where part of the property consists of idols and places of worship, which are valuable from their endowments, or from the respect attaching to the possessor, the members will be decreed to hold them by turns, the period of tenure being in proportion to their shares in the corpus of the property." (His Lordship after dealing with questions of fact came to the conclusion that the learned Judge was clearly in error in holding that the claim of the plaintiffs was barred by limitation or, what he calls by adverse possession, and continued.) I think I have dealt with the principal points which were addressed to us by counsel. It only remains now to consider the decree which we should make. In the first place, the decree actually made is in these terms :

> Plaintiffs are entitled to one-fourth share in the properties in the plaint except Harimandir (No. 2). A Commissioner will be appointed to make the division. Plaintiff's suit for service, management and jahagir is dismissed.

That is the material part of the decree. It is well established that in effecting partition between co-parceners, all equities arising between them by reason of their separate holding or alienations and other circumstances have to be enforced, and partition should be made subject to such equities. I need not refer to the cases on the point, as the point seems to me to be obvious and not open to dispute. That being the position, here we have these branches in separate possession of particular properties for years together, and we think, therefore, that as far as possible in making partition, that position should be maintained and not disturbed, except in so far as it may be necessary in order to equalize the values of the shares of the various co-parceners. We, therefore, direct that the Commissioner, in making the division, will, as far as possible and subject to equities, allot to the plaintiffs and defendants other than defendants 1 and 2, the properties which are in their possession, and to defendants 1 and 2 properties which are in their possession except the Harimandir. If it is found impracticable to effect partition in that way, the Commissioner will have the power to make the division in the best manner possible for the purpose of equalizing the shares of the various parties. As to the Harimandir, I have explained the position. The learned Judge's view is that Harimandir No. 1 or what is called No. 1, is clearly partible.

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[1] Sakharam Hari v. Laxmipriya Tirtha Swami, (1910) 34 Bom 349=5 I C 869=12 Bom L R 157.

[2] Waman Jagannath Joshi v. Balaji Kusaji Patil, (1890) 14 Bom 167.

But in our opinion, to divide this building by metes and bounds will certainly create difficulties in the future. For instance, it would be easy for any of these contending parties, and, as far as my experience goes, the parties after a protracted trial of this nature are not likely to follow the Biblical injunction and love their cousins, to get an undesirable tenant, and thus affect the sacredness and reputation of the building in which an idol, which apparently seems to have been an object of respect and veneration to the population of Sholapur, is installed. In this respect I think we should follow the rule laid down in 35 C W N 151[3] following the earlier decision in 3 Cal 514[4]. It was held there that in the absence of any dedication of a building for the worship of the family idol, the building should not be excluded from partition merely because it is used for the worship of the idol. The Court may in such a case give an option to a co-parcener or co-parceners willing to maintain the building as a place of worship to buy it at a valuation. I think therefore, this is pre-eminently a case in which we should direct that this part, which is held to be partible, should be put up to sale among the co-parceners and alloted to the highest bidder, with liberty to the co-parceners to bid at the auction and to set off the purchase price against their share in the family properties. The ultimate purchaser will have to bind himself and his heirs to maintain the building as a place of worship and not to let it out for hire or profit but to use it only for residential purposes of his family.

As regards the right of worship, we set aside the order of the learned Judge by which he refused the plaintiffs' claim. The ordinary principle, which is recognized by our Court and by other Courts too, in a case like this, is, that the place where an idol is situate should be kept joint, with the right of access to all the co-parceners, and that the right of service should go to them by turns in proportion to their shares in the corpus of the property. That is the view taken by this Court in 6 Bom 298.[5] Accordingly, we direct that the parties should have the right of performing the service and all other rites and rituals by turns, in proportion to their shares, that is to say: Defendant 2 (defendant 1 being dead) and Narayan between themselves will have six months, three months for each, three months for Digambar's branch and three months for Narayan's branch; for Ramkrishna's branch, that is for the plaintiffs, three months; and for Hari's branch, three months, the period to commence one month from the receipt of the papers by the lower Court. We express no opinion as to the rights of the parties in the jahagir or the income thereof, as it was held by the lower Court that the Court had no jurisdiction, and we accept that decision. The defendant's appeal fails, and, therefore, the defendants will pay the costs of that appeal, only one set being allowed. As the plaintiffs' appeal is confined to right of service, the respondent will pay half the costs of the appeal. Cross-objections will be allowed. Respondents 1 and 2 must pay the costs of the other respondents of the cross-objections.

Tyabji, J.—I agree.

S.C./D.S. *Order accordingly.*

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* A. I. R. 1937 Bombay 208

WASSOODEW, J.

Radha Hambirrao Patil and *others*—Defendants—Appellants.

v.

Dinkarrao Hambirrao Patil—Plaintiff—Respondent.

Second Appeal No. 1023 of 1932, Decided on 6th October 1936, against decision of Dist. Judge, Satara, in Appeal No. 243 of 1931.

(a) Res judicata—Suit dismissed—Issues decided against successful defendants cannot operate as res judicata in subsequent suit.

Where in a previous judgment a plaintiff's suit is dismissed, the issues decided against the defendants cannot operate as res judicata in a subsequent suit, for the successful defendants cannot appeal from a finding on any such issue. [P 209 C 2]

*** (b) Hindu Law — Adoption — Widow — Prior adoption declared invalid—Existence of invalidly adopted son is no impediment to subsequent adoption.**

Where a prior adoption by a widow is declared invalid, the existence of an invalidly adopted son is no impediment to the subsequent adoption, for the person to whom adoption is made would be regarded as sonless and his widow would then be competent to adopt a son to him: *Case law discussed.* [P 210 C 2 ; P 211 C 1]

S. Y. Abhyankar—for Appellants.

P. S. Bakhale—for Respondent No. 1.

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[3] Sachindra Chandra v. Hemchandra, A I R 1931 Cal 573=132 I C 688=35 C W N 151.

[4] Rajcoomaree Dasee v. Gopal Chunder Bose, (1877) 3 Cal 514.

[5] Mancharam v. Pranshankar, (1881) 6 Bom 298.

Judgment.—The common question raised in these three appeals, Nos. 918, 919 and 1023 of 1932, relates to the validity of the adoption of one Dinkarrao by one of the three surviving widows of Hambirrao by name Guna. In one of the suits, the adoptee Dinkarrao has claimed to recover possession of certain property from the co-widows of his adoptive mother, and the other two suits are for a similar relief by the two transferees from the said Dinkarrao. The material facts leading to these suits, which are not disputed, are these: Hambirrao, who possessed considerable property, died in 1918, leaving behind him three widows, the adoptive mother Guna, who was the most senior in age, and two others, in order of seniority, Radha, defendant 1, and Savitri, defendant 2; Guna claiming to be the most senior widow on account of her alleged marriage with Hambirrao before the two others, adopted one Subrao in 1919, who was the sister's son of the said Hambirrao. The status of Subrao was challenged by the co-widows of Guna, and the suit which was filed by him in 1921 for possession of Hambirrao's property was dismissed, and the adoption was held invalid on the ground that amongst the Kshatriyas, to which caste Hambirrao's family belonged, the adoption of the sister's son was illegal. It was also held in that suit that Guna was the seniormost widow. After that adoption was declared invalid, Guna adopted a second boy, the present plaintiff Dinkarrao.

Both the Courts below in these suits have held that Dinkarrao has been validly adopted with proper form and ceremonies, that his caste is the same as that of Hambirrao and that Guna being the seniormost widow was competent to adopt a son to her husband. The rival adoption set up by Savitri, the youngest widow, with the consent of Radha, defendant 1, was held to be invalid. Upon the contest as to whether Guna or Radha was senior, the lower appellate Court did not express any opinion, perhaps, as I understand its judgment, that point was given up expressly before it—as also the other points, more or less important—the appeals being confined to the question whether there was inferiority in the caste of Dinkarrao disqualifying him for the purpose of adoption. In view of those findings, the decrees for possession with mesne profits and costs were confirmed in the first appeal. Against those decrees, the defendants, principally the co-widows of Guna and the son adopted by Savitri, have filed these appeals.

As regards the effect of the previous judgment in the suit filed by Subrao, it is conceded that when Subrao's suit was dismissed, the issues decided against the defendants, namely Guna's co-widows, could not operate as *res judicata* in a subsequent suit, for the successful defendants could not appeal from a finding on any such issue. Consequently, the finding in the previous suit that Guna was the most senior widow would not operate as *res judicata*, and the contrary assumption by the Courts below is wrong. Mr. Abhyankar for the appellants has questioned the status of Guna as the seniormost widow, and on account of the omission to decide that status in the first Appeal Court, has asked me to decide it on the evidence recorded. But the main question of law argued, which was made interesting on account of its novelty, was that Guna was incompetent to adopt for the second time during the lifetime of Subrao, because although he was imperfectly adopted, he had suffered a change of status, and the adoptive father could not be regarded as sonless during the existence of that imperfectly adopted son. Mr. Abhyankar has not challenged the findings of the lower Courts as regards the performance of ceremonies of adoption, and the qualifications of Dinkarrao to be adopted in Hambirrao's family. With regard to the status of Guna, it is not denied that in point of age, she is the oldest amongst the surviving widows of Hambirrao—the difference between her age and that of the next senior widow being about twelve years. The witnesses to the fact of the marriages of Guna and the competing widow Radha, were more or less interested, namely the widows themselves and the relatives of the rival adoptees. It is in evidence that in 1918 Hambirrao was nearly sixty and Guna was between thirty and thirty-five, and Radha not more than eight or nine years of age. Having regard to their relative ages, and the probabilities adverted to by the learned trial Judge, the statement of Guna that she was married before the rest appears reasonable and true, and I accept the conclusion of the trial Court on the point. Consequently, there is no doubt about her capacity to take Dinkarrao, who was otherwise qualified, in adoption to her deceased husband.

Turning then to the question of the capacity of Guna to adopt during the lifetime of Subrao, it is necessary to state that the notion of sonship in Hindu law is based on the capacity to present oblations and to participate in heritage. There is a trend of modern decisions to trace the foundation of the doctrine of adoption to the notion of providing for the spiritual welfare of the souls of the ancestors. It was held in 35 Bom L R 859,[1] that the validity of the adoption must be determined by spiritual rather than temporal considerations, the consequent devolution of property on the adopted son being merely accessory to it and altogether a secondary consideration. Therefore, if the essential capacity is wanting, the mere existence of filial relationship is not sufficient. On that ground, the existence of congenitally blind and congenitally dumb sons has not prevented according to the Shastras the adoption to their fathers (*see* Dat. Mim. II, 6; Yajnavalkya II, 33 : Mit. I, xi, 21, 1 Strange, Hindu Law 77 and 152). In 43 Mad 4,[2] the rule of Hindu law which prevented a congenitally blind person from inheriting was regarded as obsolete. The texts on the subject have been examined recently in 46 Bom 455,[3] where Shah, J. very admirably summarised the effect of the texts of Atri, Manu, and Saunaka which laid down that the adoption could be made only by a person who has no son (*aputrena*), that is who never had a son or whose son is dead. Then in the following passage the doctrine of Yajnavalkya and Vijnanesvara has been set out (p. 459) :

> It is clear from these passages that neither Yajnavalkya nor Vijnanesvara would have favoured the view that a person having a son subject to any of the defects mentioned by them would be treated as sonless. Indeed it appears from Visvarupa's commentary on these verses of Yajnavalkya that those who are excluded from inheritance are not necessarily incompetent to perform sacrifice, etc.

And the learned Judge then thus concludes on the point before him that :

> A person having a grandson who is subject to the defect of dumbness from his birth as in this case cannot correctly be described as sonless so as to make an adoption by him during the lifetime of the grandson valid.

It is urged that in the same way a person who has got a son, though imperfectly adopted, cannot be described as sonless so as to make the adoption by him or his widow during the lifetime of the said son valid. It might be said that the decision in *Bharmappa's case*[3] is not unfavourable to the view that a person having a disqualified son can never be considered sonless. In his Law of Adoption, Mr. Kapur has quoted the following passage from Sutherland on this question: *see* Sutherland's Synopsis of Hindu Law, p. 212 :

> The primary reason for the affiliation of a son being the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father on which the salvation of a Hindu is supposed to depend, it is necessary that the person proceeding to adopt should be destitute of male issue capable of performing those rites. By the term 'issue', the son's son and grandson are included. It may be inferred that if such male issue although existing were disqualified by any legal impediment from performing the rites in question, the affiliation of a son might legally take place.

The learned advocate has relied upon a passage in Mayne's Hindu Law, which is indirectly suggestive of the view propounded, namely, that if upon an invalid adoption, there is a change of status by reason of the performance of necessary ceremonies, and which change prevents the adoptee from going back into his natural family, he might be regarded as a son with certain privileges : *see* para. 176 to 178 of Mayne's Hindu Law and Usage, 9th Edn., pp. 243 to 245. But the learned author does not consider the effect of an invalid adoption, on the right of the adoptive father to adopt another in succession. The effect of an invalid adoption has been considered in Mulla's *Hindu* Law (8th Edn., para. 510, at p. 559), and upon a consideration of the authorities it is stated that all that the son is entitled to in the adoptive family is maintenance. Assuming that the change of status establishes a right to maintenance in the adoptive family, the question is whether the adoptee could on that account be regarded as a son with a disqualification preventing a subsequent adoption. I do not find any authority or text putting such an invalidly adopted son in the same position as a congenitally blind or dumb son, assuming that cases such as *Bhar-*

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[1] Amarendra Man Singh v. Sanatan Singh, A I R 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642=35 Bom L R 859.

[2] Surayya v. Subbamma, A I R 1920 Mad 361=53 I C 498=43 Mad 4=37 M L J 405.

[3] Bharmappa v. Ujjangauda, A I R 1922 Bom 173=65 I C 216=46 Bom 455=23 Bom L R 1320.

mappa v. *Ujjangauda*[3] represent the more progressive view in modern times on the point. The authorities on the other hand support the view that the existence of an invalidly adopted son is no impediment to the subsequent adoption. In 22 Bom L R 817,[4] it was held that a widow could not adopt a son to her husband when there was in existence a son adopted by her husband. In that case, which discouraged successive adoptions, it was pointed out that the widow's right to adopt to her husband would not arise until that adoption was set aside, and that adoption could not be treated as invalid justifying a second or successive adoption. A similar expression of opinion is contained in 46 Bom 400,[5] where it was held that under Hindu law a widow could not adopt a son during the lifetime of a son adopted by her husband, even though the validity of the adoption by her husband was doubtful; and it was pointed out that a widow could not adopt any other boy during the lifetime of the adopted boy or until the adoption was declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate. Those decisions rather support the view that upon a declaration that the adoption is invalid, a person to whom the adoption is made would be regarded as sonless, and that his widow would then be competent to adopt a son to him. That is more consistent with the doctrine of spiritual welfare, and is in line with the current of authority in this presidency. Therefore on the second point the appellants fail. For the above reasons, the lower Courts' decrees are confirmed, and these appeals dismissed.

V.B.B./K.S. *Appeals dismissed.*

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[4] Bhujagonda v. Babu Bala, A I R 1920 Bom 115=57 I C 573=44 Bom 627=22 Bom L R 817.

[5] Bhau Adgauda Patil v. Narasa Gouda Tatya, A I R 1922 Bom 300=64 I C 614=46 Bom 400=23 Bom L R 1272.

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BROOMFIELD AND SEN, JJ.

Gangadhar Laxman Deshpande and *another* — Plaintiffs — Appellants.

v.

Dattatraya Laxman Deshpande and *others* — Defendants — Respondents.

First Appeal No. 39 of 1935, Decided on 15th October 1936.

(a) Civil P. C. (1908), Sch. 2, Para. 20—Part of award dealing with property outside jurisdiction — If such part is separable without disturbing basis and equilibrium of award as whole, Court can delete such part and file rest of award.

Where a part of the award deals with property outside the jurisdiction of the Court but is separable from the rest of the award without disturbing the basis and equilibrium of the award as a whole, the Court can delete such part of the award and order the rest to be filed: *A I R 1924 P C 95; A I R 1914 P C 105; 37 Bom 442; A I R 1929 Bom 193* and *A I R 1931 Rang 252 (F B), Rel. on; A I R 1932 Mad 462, Dissent.* [P 213 C 1]

(b) Arbitration — Award — Ornaments, houses and certain piece of land directed by award to be sold to any member willing to purchase at market price — Amount fetched after deducting such purchaser's share to be divided equally amongst rest — Award could at best be said to be declaratory — Award held not void for indefiniteness as arbitrators were not bound to specify share of each member in particular.

On a dispute between the members of a certain family as to what share, right and interest each of them had in the joint family property, the matter was referred to arbitration. The arbitrators, while making the award stated that if any of the members purchased the ornaments, the houses and the piece of land at the market price, the amount remaining after deducting such purchasing member's share, should be divided equally amongst the rest. It was contended that the award was void for indefiniteness as it did not specify the share of each member in the said property:

Held: that the cardinal point in the controversy was not a complete partition. The arbitrators were not bound to specify the share of each member in particular. The award could at best be said to be declaratory. The award could not be said to be void for indefiniteness: *37 Bom 442, Ref.* [P 213 C 2; P 214 C 1]

G. N. Thakor and *P. B. Gajendragadkar* for *M. C. Honap*—for Appellants.

B. G. Modak and *V. D. Limaye* — for Respondents 1, 3 and 4.

Broomfield, J.—This is an appeal from an order of the Joint First Class Subordinate Judge of Poona refusing to file an award in an arbitration without the intervention of a Court. The award relates to the estate of the late Laxman Moreshwar Deshpande of Poona. There were disputes among the members of his family which were referred for settlement to two distinguished lawyers, Rao Bahadur Narhar Krishna Deshmukh and Rao Bahadur Ganesh Krishna Chitale. They are intimate friends of the family. The reference was made on 28th July 1931, and the award was given on 27th January 1933. The application for filing it in Court under para. 20, Sch. 2, Civil P. C., was made by the appellants on 19th August 1933. Some of the other members of the family raised objections of various kinds which were made the subject of seventeen issues. Practically every point was decided in favour of the award, but the trial Judge refused to file it on two grounds : because he found (1) that one item of the property dealt with by the award is outside British India, and (2) that in certain respects the award is indefinite and incapable of execution. It may be mentioned that the second point was not the subject of any issue.

This is obviously a very unfortunate result. The estate is a considerable one. The portion of the award affected by the first objection is quite insignificant and even the part affected by the second objection appears to be less than a quarter of the whole. The trial Judge was evidently satisfied, and rightly, in our opinion, that the award is fair and equitable, and on most points a final settlement of the disputes between the parties. He thought however that in these two particulars which I have mentioned the award was invalid and that he had no alternative but to refuse altogether to file it. We are of opinion that the learned Judge was wrong on both points. The point of jurisdiction arises in this way. Among the outstandings due to the estate there is a small debt (the principal being only Rs. 90) secured by a mortgage of land in a village called Angaon or Khoda, which is in the Bhor State. In the schedule of properties attached to the reference paper this land was included among the immoveable properties to be dealt with, but in the award it is not included among the immoveable properties nor are any instructions given about the mortgaged land. The only directions given are these :

> In Sch. (c) the debts taken by people on hand and on mortgages are mentioned. All those debts should be recovered by Dattatraya. Whatever amount remains with him after defraying the expenses should be distributed by him equally among the three sharers after retaining one share for himself.

Then the names of the sharers are mentioned. Sch. (c) contains this provision :

> Lands at Powd and Angaon. These are mortgaged in the name of Mr. D. L. Deshpande who should arrange to make the recoveries.

The learned counsel who appears for the appellants argues that the land is not dealt with at all. All that the award says is that Dattatraya is to recover the money and after recovery—by which time it would be moveable property within the jurisdiction—he is to distribute it among the persons entitled to it. We hold that this contention is correct. It may be that in order to recover the money, proceedings would have to be taken in respect of land outside the jurisdiction. But on that point the award is silent. So far as the award goes, it cannot be said that it deals with any property outside the jurisdiction. That being so, the legal difficulty which the learned trial Judge found to be insuperable does not really arise. But we think that there is no substance in it anyhow. No doubt 55 Mad 689,[1] cited by the learned Judge, supports the view which he has taken. The Madras High Court has held in that case that the language of para. 20, Sch. 2, requires that the Court must have jurisdiction over every item of the property dealt with by the award, and that if this is not so, the award cannot be split up and nothing can be done but to refuse to file it. This would mean that in many cases private arbitrations could never be made effective in the manner contemplated by the Legislature, since there would be no Court to which the application could be made. With all deference to the learned Judges who decided this case, we are not satisfied that this is the law.

In 51 I A 72[2] their Lordships of the Privy Council declined to commit themselves to the proposition that an application to file an award can only be dealt with by a Court having jurisdiction over the whole of the subject matter. In 36 All 336,[3] which was a case of an arbitration without the intervention of the Court, the Privy Council treated it as settled law that if the part of an award which is invalid is separable, it may be separated and the rest of the award maintained. No doubt, the invalidity in that case consisted in the fact that the arbitrators had exceeded their powers under the terms of the reference. But if the principle of separability is to be accepted (and that principle is recognized in para. 14 of Sch. 2, to which

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1. Krishna Iyer v. Subbarama Iyer, A I R 1932 Mad 462 = 139 I C 877 = 55 Mad 689=62 M L J 550.
2. Ramlal Hargopal v. Kishanchandra, A I R 1924 P C 95=83 I C 531=51 I A 72=51 Cal 361=20 N L R 33 (P C).
3. Amir Begam v. Badr-ud-din Husain, A I R 1914 P C 105=23 I C 625=17 O C 120=36 All 336 (P C).

para. 21 refers back), it is not easy to see why it should not be applied so as to get rid of the invalid part of the award, whatever the nature of the invalidity. There are decisions of this Court which are inconsistent with the view taken in Madras. In 37 Bom 442[4] this Court held that it does not follow that an award cannot be filed because it deals with some matters which are not within the jurisdiction. I may refer also to the observations of Baker, J. in 31 Bom L R 349[5] at p. 354. In the referring judgment of Page, C. J. and Mya Bu, J. in 9 Rang 480,[6] the position is stated thus (p. 485):

> Whether such want of jurisdiction vitiates the decree as regards both the property over which the Court has jurisdiction, and that over which the Court has no jurisdiction, or only as regards the latter depends, in our opinion, on whether the nature of the case permits of a separation of the part concerning the one from that concerning the other without affecting its basis.

We hold that that is the correct view to take. Even in cases where a part of an award deals with property outside the jurisdiction, if that part is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed. The provisions in the award which have been held to be bad for indefiniteness are the following: After dealing with certain ornaments which are ordered to be distributed among the four persons named, the award says this:

> Or if any one desires to purchase them the market price of all these ornaments should be assessed and deducting the amount of his own share distribute the balance equally among the three sharers.

Then one of the houses (house No. 377) is dealt with in this way:

> There are three claimants to this. But in order that there may be no dispute and as if the house is divided into three parts it will not be convenient to any one and it will not be convenient for residence also, and if the house is so divided the value of the house and of the parts also will not remain the same; considering all these things we decide that this house should be divided into two parts only by an equitable partition. Each one of those two who take the whole house as their shares should pay to the third sharer Rs. 2,667 as the price of his third share. That is to say both together should pay Rs. 5,334. Then they should make two equal divisions by an equitable partition and take possession thereof.

Another house, No. 149, was dealt with as follows:

> The four sharers, viz., (1) Dattatraya, (2) Gangadhar, (3) Vasudev, and (4) Ganesh and Manohar have got four-fifths share. The disputes between the *bhaubands* regarding his house are not settled as yet. We have assessed the value of the said four-fifths share as Rs. 3,000. It is our opinion that it is desirable that the said house, considering its condition, should be kept by anyone. It will be neither convenient nor desirable to partition the same according to shares. Hence we decide that any one of the four sharers who wants to keep the house for himself may keep it after paying to each of the remaining sharers Rs. 750.

Then a piece of land, survey No. 5 at Vadgaon, is disposed of thus:

> Disputes are up to now going on regarding survey No. 5 at Vadgaon (that means admittedly disputes with third parties, not among the parties to the award). After that dispute is settled any one who wants that land should pay to the remaining three sharers the amount of his share of the market value of that land and keep the same in his possession.

The learned trial Judge referring to these provisions in the award says:

> They (that is the arbitrators) do not settle as to what individual sharer should keep possession of this house and pay the rest. Thus the matter is left unsettled, as to who should demand money or possession and from whom. Similar direction is given in the award as regards the land of survey No. 5 of Vadgaon. The matter as to who should keep possession and who should pay money and to whom is left unsettled. And the same remarks have to be made as regards ornaments and silver pots directed to be divided in four equal parts in the award. There also the matter is left unsettled and it is not known who is to keep ornaments and who to pay and to whom and what. If application for execution of the decree is made to the executing Court, the decree will be found incapable of execution in the absence of explicit and unequivocal orders.

The learned Judge is mistaken in saying that the award does not settle the amount to be paid. But apart from that we do not consider that the objection taken by him is really substantial. He appears to consider that the cardinal point in the controversy was a complete partition. If he means by that however that under the terms of the reference the arbitrators were bound to specify in every particular which person was to take a particular portion of the estate, he appears to be wrong. No support for that view can be deduced from the terms of the reference. What is stated in Ex. 40 is this:

> A dispute has arisen between all of us as to what share each one of us has in the aforesaid property or what right and interest each one of us has in the aforesaid property. There is also dispute as to the way in which the whole of the property is to be equitably divided. The dispute is being settled between us by mutual consultation. Hence all of us are appointing both of you

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[4] Raghavendra Ayyaji v. Gururao Raghavendra, (1913) 37 Bom 442=19 I C 882=15 Bom L R 362.

[5] Kashinath v. Gangubai, A I R 1929 Bom 193 =117 I C 523=31 Bom L R 349.

[6] S. A. Nathan v. S. R. Samson, A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

as arbitrators unanimously. Whatever award is given by you unanimously will be acceptable to us.

As I have mentioned, the arbitrators are all friends of the family and no doubt well acquainted with the character and circumstances of its members. It may well be that certain matters of detail must be left or are better left to be settled by mutual arrangement. It cannot be said that the provisions to which objection has been taken render the award an invalid award. The most that can be said I think is that the award in these respects is only declaratory. That does not mean however that it is void for indefiniteness. In that connexion I may refer to 37 Bom 442.[4] Here also of course the principle of separability might probably be applied if necessary. We hold however that it is not necessary at all. The result is that the appeal must be allowed. The trial Judge is directed to file the award and to proceed in accordance with para. 21, Sch. 2. The parties will pay their own costs in the trial Court. In the appeal the appellants will get their costs from the respondents who have appeared.

W.D./A.L. *Appeal allowed.*

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BEAUMONT, C. J. AND RANGNEKAR, J.

Commissioner of Income-tax, Bombay

v.

Pirojbai N. Contractor — Assessee.

Civil Ref. No. 5 of 1936, Decided on 6th October 1936, made by Commissioner of Income-tax, Bombay Presidency and Aden.

(a) Income-tax Act (1922), Ss. 34 and 22 (2) —Assessee not previously served with notice under S. 22 (2) and his income not assessed in particular year—Such income has escaped assessment and may be assessed in following year under S. 34.

Under S. 34, Income-tax Act, what must be escaped is assessment and that means the whole process of assessment, which in the case of an individual starts with the service of a notice under S. 22 (2). The liability to assessment is a risk to which every person in British India entitled to income is liable and the process of assessment has been as much escaped by a person, who receives no notice under S. 22 (2) as by a person who receives such notice, which proves in fact ineffective. A person who receives no notice under S. 22 (2) has escaped assessment, although through no fault of his own the process of assessment has never been set in motion. And where the assessment starts with a notice under S. 34, all the relevant provisions of the Act apply as effectively as where the assessment starts with a notice under S. 22 (2). Thus if the income of a person is not at all assessed in a particular year as he is served with no notice under S. 22 (2), the Income-tax Officer is justified in taking action in the following year under S. 34 and assess the income, which has escaped assessment : *A I R 1931 Cal 545, Dissent.* ; *A I R 1934 P C 30, Disting.* ; *A I R 1931 Rang 101* and *A I R 1935 Lah 742, Rel. on.* [P 214 C 2; P 215 C 2]

(b) Precedent—Extent of authority—Judicial decision—Case is authority for what it decides and not for what logically follows from it.

(Per *Rangnekar, J.*)—A case is an authority for what it decides and not for what may logically seem to follow from it and expressions of opinion even of eminent Judges must be limited to the facts which they had before them, unless there is a strong indication to the contrary. [P 216 C 2]

K. Mc. I. Kemp and *E. M. Eastley* — for Income-tax Commissioner.

Jamshed Kanga — for Assessee.

Beaumont, C. J.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act, 11 of 1922, which raises a question within a narrow compass but of considerable importance in the administration of the law relating to income-tax, and there appears to be no direct authority upon the point. The question is :

> Inasmuch as the income of the assessee for the year ended 31st March 1934 was not at all assessed in the year 1934-35, was the Income-tax Officer justified in taking action in the following year under S. 34 of the Act to assess the said income which had escaped assessment ?

In spite of the absence of authority, I do not feel any doubt as to how the question should be answered. The material facts are these. The year of assessment is the year ending 31st March 1935, and the previous year ended on 31st March 1934. No notice was served on the assessee under S. 22, sub-s. (2), during the year of assessment, but on 24th June 1935, a notice was served on the assessee under S. 34, alleging that her income for the year of assessment had escaped assessment. Under S. 3, Income-tax Act, a tax is charged in respect of all income, profits or gains of the previous year of every individual. In S. 22 (2) it is provided that :

> In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year.

So that in the case of an individual, his liability to assessment starts with a notice from the Income-tax Officer requiring him to make a return, and if he receives no notice, he is not liable to make a return. In this case the assessee received no notice during the year of assessment. Then we come to S. 34, which provides that:

> If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

There is no doubt in this case that the assessee had income, profits or gains chargeable to income-tax, but it is said that the income, profits or gains had not escaped assessment within S. 34, because no assessment had ever been started, and, therefore, there was no assessment to escape. Reliance is placed by the assessee on a dictum of Sir George Rankin in 58 Cal 909.[1] There the learned Chief Justice said as follows, p. 912:

> Section 34 deals with income which has escaped assessment and it may be, though it is not necessary for the present purpose to decide it, that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income. I do not proceed upon that footing, because it is unnecessary for the purpose of the present case.

Reliance is also placed by the assessee on some observations of the Privy Council in 61 I A 10[2] in which their Lordships held that the expression "has escaped assessment" in S. 34 is not equivalent to "has not been assessed", but their Lordships were dealing with a different point in that case, and later in their judgment they say this (p. 16):

> It may be that if no notice calling for a return under S. 22 is issued within the tax year, then S. 34 provides the only means available to the Crown of remedying the omission, but that is a different matter.

So that the actual point, which we have to deal with, was expressly left open by the Privy Council. With all respect to Sir George Rankin, I do not think there is any force in the suggestion he made. It is quite true that the word 'escape' denotes that some risk has been avoided. If a man were to say that he spent a month in Bombay and escaped the plague, one would infer that there was an epidemic of plague, or, at any rate, some risk of plague at the time, in Bombay, otherwise the use of the word 'escape' would be inappropriate; but under S. 34 what must be escaped is assessment, and that means the whole process of assessment, which, in the case of individuals, starts with the service of a notice under S. 22 (2). The liability to assessment is a risk to which every person in British India entitled to income is liable, and I cannot see why the process of assessment has not been just as much escaped by a person who receives no notice under S. 22 (2) as by a person who receives such a notice, which proves in fact ineffective. It seems to me that a person who receives no notice under S. 22 (2) has escaped assessment, although through no fault of his own, the process of assessment has never been set in motion.

It is argued by Sir Jamshedji Kanga on behalf of the assessee that the scheme of the Act is against applying S. 34 to a case in which no notice has been given under S. 22 (2). But I do not see the force of that argument, because S. 34 itself provides that the notice served under that section may contain all or any of the requirements which may be included in a notice under sub-s. (2), S. 22, and then the assessment may proceed, and the provisions of the Act are to apply, so far as may be, as if the notice were a notice issued under that sub-section. In my opinion, where the assessment starts, as in this case, with a notice under S. 34, all the relevant provisions of the Act apply as effectively as where the assessment starts with a notice under S. 22 (2). In my opinion therefore the view of the Income-tax Commissioner is right, and the question submitted to us should be answered in the affirmative. The assessee to pay the costs less the amount of the deposit of Rs. 100. Costs to be taxed on the Original Side scale by the Taxing Master.

Rangnekar, J.—I agree. The question raised on this reference is not covered by any direct authority, and counsel therefore have, not unnaturally, relied upon the scheme of the Act and some judicial *dicta* in several cases in support of their respective contentions. Shortly put, the assessee's contention is that, having regard to

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1. *In re* Lachhiram Basantlal, A I R 1931 Cal 545=133 I C 187=58 Cal 909=35 C W N 310 (S B).
2. Rajendra Nath Mukerjee v. Income tax Commissioner, A I R 1934 P C 30=147 I C 663=61 I A 10=61 Cal 285=36 Bom L R 267 (P C).

the scheme of the Act, S. 34 is inapplicable when no notice at all has been issued to an individual under S. 22 (2) and consequently his total income not at all assessed under S. 23. He says that in that case the expression 'escape assessment' used under S. 34 cannot apply, and that the expression is only appropriate when an individual has been assessed in respect of his total income but for some reason or other part of the income chargeable to the tax was in fact not so charged. S. 34 is in these terms:

> If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2), S. 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section: Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

In my opinion, the section plainly means that, if for any reason the income of an individual chargeable to the tax has not in fact been charged, or where the income is charged at a lower rate, then it is competent to the income-tax authorities to take action under the section. The section is wide enough to include not only a case where there has been a previous assessment but some part of the income was not assessed or has been assessed wrongly, but also the case where there has been no previous assessment at all. Now, it is true that the dictionary meaning of the word 'escape' is *inter alia* "to get off safely when pursued" or "to get clear away from (pursuit or pursuer)" or "to succeed in avoiding (anything painful or unwelcome)" etc. Even so, it is difficult to see why the expression 'escape assessment' cannot apply to the case where there has been no assessment at all, particularly having regard to the very scheme on which reliance is placed. S. 3 is the charging section. Then the next important section is S. 22, which starts the machinery by which the assessable income of an individual or a company has to be determined. Sub s. (2) of S. 22 provides that the Income-tax Officer shall serve a notice upon a person, whose total income is in his opinion of such an amount as to render him liable to income-tax, to furnish a return in the prescribed form of his total income. S. 23 empowers the Income-tax Officer to assess the total income of the individual and determine the amount of the tax payable by him.

Therefore it is clear that every individual in this country, whose total income is of such an amount as to render him in the opinion of the Income-tax Officer liable to income-tax is exposed to the risk of being assessed to the tax, and if, for some reason or other, no notice under S. 22 (2) is issued to him, he certainly to that extent 'escapes assessment'. Assessment means, according to the Privy Council in 61 I A 10,[2] the whole process of assessment which is started by the notice under S. 22 (2). If the individual therefore gets no notice, I see no difficulty in holding that he 'escapes assessment'. It is for this purpose that S. 34 in its concluding portion brings the whole scheme into operation. Thus it provides that in such a case, a notice containing all or any of the requirements which may be included in a notice under S. 22 (2) has to be issued and the assessment to commence, and that all the provisions of the Act, so far as may be, shall apply as if the notice issued under S. 34 was issued under S. 22 (2).

The learned counsel relied on a *dictum* of their Lordships of the Privy Council in 61 I A 10.[2] It was argued in that case that upon the facts it was a case of income escaping assessment within the meaning of S. 34. It was with reference to this argument that Lord Macmillan observed as follows: "This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed'. Their Lordships cannot assent to this reading" (p. 16). In the first place, in my opinion, a case is an authority for what it decides, and not what may seem logically to follow from it, and expressions of opinion, even of eminent Judges, must be limited, unless there is a very strong indication to the contrary, to the facts which they had before them. Apart from this, I think, when their Lordships said that the expression 'has escaped assessment' is not equivalent to 'has not been assessed', all that their Lordships intended to mean is that as in that case the course of the assessment had not been completed, and no final order of assessment was made, it could not be said that income had 'escaped assessment'. If this *dictum* means what the learned counsel says it does, then their Lordships would not have made the following observations at the end of the same paragraph. This is what they say (p. 16):

> It may be that if no notice calling for a return under S. 22 is issued within the tax year, then S. 34 provides the only means available to the Crown of remedying the omission, but that is a different matter.

In any event, it is therefore clear that the point which we have to consider in this case was left open by their Lordships of the Privy Council. The learned counsel also relied on some observations made by me in 37 Bom L R 697.[3] I do not think that I have said anything in that case which is contrary to the view which I am now taking on this reference. In that case we had to consider S. 34 with reference to the facts before us. The facts were that a person had already been assessed previously by one Income-tax Officer. In the next year of assessment, another Income-tax Officer thought the previous assessment was wrong and was made at a lower rate, and it was in that connexion that the observations I made became necessary. On the other hand, the view which we are taking was also taken in 9 Rang 161[4] and in 16 Lah 937.[5] It is true that the facts in those cases were not similar to the facts before us; but I think the opinions expressed in those cases seem to me, with respect, to be correct. I agree therefore that the question should be answered in the way proposed by my Lord the Chief Justice.

V.B.B./A.L. *Reference answered.*

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3. Commissioner of Income-tax v. Gopal Vaijnath, A I R 1935 Bom 410=158 I C 757=59 Bom 626=37 Bom L R 697.
4. Commissioner of Income-tax v. N. N. Burjorjee, A I R 1931 Rang 101=131 I C 507=9 Rang 161 (S B).
5. Madan Mohan Lal v. Commissioner of Income-tax, Punjab, A I R 1935 Lah 742=158 I C 718=16 Lah 937=38 P L R 52 (F B).

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BROOMFIELD AND WASSOODEW, JJ.

Saiyad Jaffar El Edrus—Appellant.

v.

Saiyad Mahomed El Edrus and *others*—Respondents.

First Appeal No. 66 of 1932, Decided on 23rd November 1936.

(a) Mahomedan Law—Wakf — Sajjadanashin — Ordinarily Sajjadanashin has full powers of disposition over surplus income of wakf properties—Morally, he is bound to provide for needs of indigent members of family—Legally, disposition of money is in his hands subject to terms of grant and custom of institution.

It is the duty of the sajjadanashin to apply the income of the wakf properties for the purposes of endowment. He has ordinarily full powers of disposition over any surplus income. In the exercise of that power he may, and no doubt it is very desirable that he should, provide for the needs of indigent members of the family. It may even be said that he is under a moral obligation to do so. But legally the disposition of the money is in his hands, subject to the terms of grants under which the property is held and to any proved custom of the institution: *A I R 1922 P C 384, Rel. on.* [P 219 C 1]

(b) Limitation Act (1908), Arts. 62, 89 and 120—Co-sharer in Moglai Hak mortgaging it to raise loan—Loan not being repaid co-sharer selling Hak to mortgagee without consent and knowledge of other co-sharer—Purchase money appropriated by mortgagee towards payment of loan—Demand by other co-sharer for share of purchase money refused by vendor co-sharer—Suit by other for share of purchase money within six years after date of refusal—Arts. 62 and 89 do not apply—Art. 120 applies and suit is within time.

A co-sharer in the Moglai Hak (which was a right granted by State to receive revenue) mortgaged that right to the State and raised some loan. As the loan was not repaid it was settled that the State should purchase the Hak and keep the purchase money in deposit till repayment of the debt. In December 1915 the loan was cleared off by appropriating the purchase money. The sale was carried out without the consent and knowledge of the other co-sharer in the Moglai Hak. He made a demand of a share of the sale proceeds in 1920 but the demand was refused in 1925. He therefore brought a suit in 1927 for a share of the sale proceeds:

Held: that Art. 62, Lim. Act, did not apply as there was no actual receipt of money within the meaning of that Article. Art. 89 also did not apply as the sale being without plaintiff's consent and knowledge, the fact of agency could not be established. Art. 120 however applied and under that Article the time would begin to run from the date when the account was demanded and refused. The suit brought within six years from that date was in time: *A I R 1922 Mad 150 (F B) & A I R 1928 Bom 365, Rel. on.* [P 222 C 1, 2; P 224 C 1, 2]

H. D. Thakor — for Appellant.

H. M. Choksi — for Respondent No. 1.

H. D. Thakor and *K. M. Shastri* — for Respondents No. 2.

Broomfield, J.—The parties to this litigation, with the exception of respondent 2, the Court of Wards, are members of the well known Edrus family of Surat tracing its descent from the Prophet Mahomed, the early history of which is recorded in 13 Bom 555.[1] There are certain Durgahs or Rozas (shrines) of the ancestors of the family at Surat and Broach for the maintenance of which the

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1. Sayad Abdula Edrus v. Syed Zain Syed Hasam Edrus, (1888) 13 Bom 555.

villages of Umraj and Orma have been dedicated under ancient grants. There are also private properties. The administration of the estate is normally carried on by a sajjadanashin who is also mutawalli, but in the time of Syed Ali, who was sajjadanashin from 1909 to 1926, it became so impoverished that the secular management had to be taken over by the Court of Wards. This appeal arises in one of several suits disposed of by the First Class Subordinate Judge, Surat, in a single judgment. The particular suit with which we are concerned is No. 586 of 1927. Plaintiff is the son of Abdullah, the eldest son of a former sajjadanashin, Syed Hasan. As a matter of history it may be mentioned that Syed Hasan appointed his second son Zain to succeed him as sajjadanashin. In 1882 plaintiff's father Abdullah claimed the gadi in the suit which was decided in *Sayad Abdulla Edrus* v. *Syed Zain Syed Hasan Edrus*,[1] but the High Court upheld Zain's appointment. Zain was succeeded by his son Syed Ali who appointed his nephew Hasan to succeed him. Hasan abdicated in favour of his father Jaffar. Hasan and Jaffar are defendants 2 and 3 in the present suit. Defendant 1 is the Court of Wards.

The plaintiff claims: (1) a share by partition in two private properties in Surat, (2) maintenance at Rs. 50 a month with arrears from September 1921, out of the income of the wakf properties, (3) the sum of Rs. 2,275 being his share in the sale-proceeds of certain dues called the Sachin Moglai Hak, (4) various other reliefs which it is not necessary now to specify. The trial Court has allowed the first three claims with the exception that maintenance has been awarded at Rs. 20 a month up to April 1925, and thereafter at Rs. 40 a month. Defendant 1 has also been ordered to pay plaintiff Rs. 387-10-0 with interest at nine per cent. for his share in remission of assessment of Orma village. The other reliefs have been refused. In this appeal, which is brought by defendant 3, the sajjadanashin, objection is taken to the decree so far as it awards maintenance and a share in the proceeds of the Moglai Hak. The plaintiff's claim to maintenance is based according to the plaint on an alleged ancient family custom by which a monthly allowance and various other allowances are payable as of right to every member of the family. It is alleged that the villages Umraj and Orma were granted partly with the object of providing these allowances and also that the right of plaintiff's father and of plaintiff himself to receive them has been acknowledged by the sajjadanashins and mutawallis from time to time. On behalf of the appellant it is contended that no such custom is proved, that the two villages are Durgah properties and were granted for the maintenance of the shrines that such payments as have been made to plaintiff's father and plaintiff and other members of the family have been made as a matter of grace at the discretion of the sajjadanashin and not as a matter of right, and that there is no legal charge on the wakf properties in respect of such claim. In any case it is contended there is no right to claim arrears of maintenance and the rate of maintenance is excessive.

No issue was sought as to the alleged custom of the family and in fact the trial seems to have been conducted in a rather haphazard fashion. A multitude of documents was produced and the Court was left to do the best it could with them. There is no oral evidence. It appears from the Durgah accounts and from other evidence, and it is not disputed, that it has in fact been customary for the sajjadanashin to pay certain allowances mostly of a very small amount to members of the family, especially female dependants. We have lists of such payments made by Mahomed III (1758 to 1840), Syed Hasan and Syed Zain: Exs. 245, 246 and 247. Syed Hasan in his will made in 1869, (Ex. 118, para. 24) enjoined upon his successor to maintain his family and children "according to the old practice of maintaining the people of the ancient mutawallis". In his deposition in the suit of 1882, (Ex. 804) Zain admitted a custom by which the income of the wakf properties was utilized among other things for the maintenance of the members of the family. Plaintiff's father Abdulla was impoverished by that litigation in which he failed. He was paid an allowance of Rs. 30 a month by Zain which was subsequently increased to Rs. 50. He was also given a house to live in. Incidentally it may be mentioned that in the agreement relating to this Ex. 418 he acknowledged Zain's sole ownership of the house. After Abdulla's death plaintiff was paid Rs. 20 a month up to 1921, when the allowance was discontinued owing to his hostile attitude (Ex. 544).

But to say that it has been customary for the sajjadanashin to make these payments towards maintenance of members of the family is one thing; to say that any and every member of the family of the sajjadanashin and his predecessors is entitled to claim as of right to be maintained out of the income of the wakf properties is quite another. It is the duty of the sajjadanashin to apply the income of the wakf properties for the purposes of the endowment. He has ordinarily full powers of disposition over any surplus income, as pointed out in 48 I A 302.[2] In the exercise of that power he may, and no doubt it is very desirable that he should, provide for the needs of indigent members of the family. It may even be said that he is under a moral obligation to do so. But legally the disposition of the money is in his hands, subject to the terms of the grants under which the property is held and to any proved custom of the institution: *see* 50 I A 92,[3] where 48 I A 302[2] is explained. The terms of the grants I shall discuss in a moment. All I am concerned to point out now is that the evidence as to what the sajjadanashins have in fact done in the past is consistent with the view that they acted in exercise of their right of disposing of the surplus income according to their discretion. As long as there was any surplus income available, it appears that the members of the family in need of maintenance received some allowance, so there may not have been any occasion for dispute. However that may be, there is nothing to show that maintenance was claimed as of right until the estate was taken over by the Court of Wards in 1923, and the position then taken up by Syed Ali was that, though it had been the custom to pay maintenance to near relations, it had been entirely a matter in the discretion of the sajjadanashin and no one could claim it as of right: (Exs. 543 and 544).

So far as this part of the case is concerned, that appears to be the correct position. Certainly there is no ancient, definite and invariable custom proved by which all members of the family can claim maintenance or which would support the claim of the present plaintiff in particular. Nor is there any evidence worth the name of any acknowledgment of such a right. That being so plaintiff has nothing to rely upon except the Firmans and Sanads relating to the grant of the villages of Umraj and Orma. The original grants are not forthcoming in either case, but there are a great many deeds renewing and confirming the grant from the beginning of the seventeenth century onwards. They are all in the name of the sajjadanashin for the time being and generally speaking they are expressed to be made for the expenses of one or more of the Durgahs or Rozas and the fairs and festivals connected therewith without any reference to the family of the sajjadanashin. Details are given in the judgment of the lower Court (pp. 29 and 30 of the print), and it is unnecessary to refer to any of the documents except those on which plaintiff relies. Ex. 169, dated 1609, begins by reciting that the village of Umraj

> had been fixed in accordance with the high Imperial Mandate together with the other places as provision for the maintenance of the Asylum of Syedship and leadership Syed Ahmed Aidroos.

It then goes on to state that:

> Whereas it appears that of the family of Aidroos Syeds who are now at Broach Syed Ahmed is the most learned, master of divinity, having a large number of followers dependent on him,

the village of Great Divi should be given in lieu of Umraj and was granted "for the maintenance of the aforesaid personage and his adherents". It appears however that this was merely a temporary measure, for Great Divi did not continue to belong to the family and Umraj was restored to it. Since the deeds relating to Umraj itself contain no such reference to the followers and adherents of the sajjadanashin, Ex. 169 can hardly be said to support the plaintiff's case, even assuming that followers and adherents would include all the members of his family. Reliance is also placed on Ex. 168, dated 1679. This is a grant in the usual form reciting that the village of Umraj had been settled for the expenses of the holy Roza of Syed Ahmed Edrus. There is an endorsement on the back stating that it was settled for maintenance (गुजराननी मदद अने रोजना खरचने माटे in the Gujarati translation of the Persian original) and for the expenses of the Roza. Probably this does mean maintenance of the grantee, i. e., the sajjadanashin, and of course it is perfectly reasonable that the man who is to administer the endowment should live out of it. It can hardly mean more than that and anyhow the use of this vague expression in a single document is obviously no support to the claim now put forward by the plaintiff. Of the documents relating to Orma only one, Ex. 650, makes any reference to maintenance. This is an order of the Ruling Power on a petition made by the sajjadanashin relating to two villages, Songarh "which is meant for the maintenance of the petitioner" and Orma "which is granted for the expenses of the shrines". The order was :

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[2] Vidya Varuthi Thirtha v. Balusami Ayyar, A I R 1922 P C 123=65 I C 161=48 I A 302 =44 Mad 831 (P C).

[3] Muhammad Hamid v. Mian Mahmud, A I R 1922 P C 384=77 I C 1009=50 I A 92=4 Lah 15 (P C).

> The revenues of the villages mentioned above are granted for the expenses for the Oras of the shrines and for the maintenance of Syed Sharif Shaikh, the Sajjadanashin.

It is extremely doubtful if this means that both villages were granted for the maintenance of the sajjadanashin in view of the previous recitals. In any case this order cannot show that the village of Orma is charged with the maintenance of the whole of the family of that sajjadanashin and the whole of the family of all his successors. It appears that there were at one time several other villages which were granted for the maintenance of the sajjadanashin. These apparently have been resumed or lost in some way. It cannot be assumed however as Mr. Choksi for the plaintiff suggested, that the villages of Umraj and Orma thereby became charged with the cost of maintenance. There are also on record a number of documents called Tauliatnamas, these being the deeds by which the sajjadanashin (mutawalli) appointed his successor. Several of them, for instance, Exs 117, 170 and 171, lay stress on the absolute powers of the mutawalli to deal with the income of the estate at his discretion and to spend it "as he may choose and for whatever person he may choose and for whatever thing he may choose." They also contain expressions such as this :

> The duties appertaining to the buildings and repairs and of the usual fairs of the great ancestors and of the affairs of the prosperity of all those things and of the family and of attending to the visitors to the shrines.

These are very old documents, but as recently as 1909, Syed Ali in a public declaration, Ex. 172, referred to the fact that his father had entrusted him with the duty among other things of "rendering assistance and help to the members and relations of the house." It is hardly necessary to point out, however, that if the villages in question are not chargeable with the maintenance of the family under the sanads by which they were granted or under any custom having the force of law, these Tauliatnamas could not make them so chargeable. Apart from that, the very vague expressions referred to cannot possibly be regarded as a foundation for the claim that the sajjadanashin is legally bound to maintain not only the members of his own family but also the family of his predecessors out of the income of the wakf properties. The learned trial Judge has found that maintenance has never been paid as of right and that though some maintenance allowance was given as a matter of grace to various members of the family from the income of the wakf properties, it cannot be regarded as a legal charge upon those properties. The only ground on which he has awarded maintenance to the plaintiff seems to be that stated at pp. 28 and 32 of the print :

> Allowances when made were not by right but looking to plaintiff being son of Abdulla debarred from sajjadanashin his case is peculiar and deserving of greater right.
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> The plaintiff is the son of Abdulla who was set aside by Syed Hasan as sajjadanashin and mutawalli. Had it not been for Abdulla's being set aside the present plaintiff would have been sajjadanashin after his father as per ordinary practice. He is entitled to some consideration.

Thus it cannot be said that the judgment discloses any legal basis for the award. Plaintiff may have been unlucky and may be a deserving person. If funds were available for the purpose it might be reasonable to allow him something. The sajjadanashin and the Court of Wards would not be exceeding their powers if they employed part of the surplus income for that purpose. But that is all that can be said. On the evidence produced in the case it is not permissible for the Court to make a decree to enforce any such payment. As we must hold, therefore, that plaintiff has not established a legal claim to maintenance at all, it is not necessary to consider the question whether he can claim arrears. But Mr. Thakor for the appellant seems to be right in his contention that in any case he could not claim arrears (*see* Baillie's Digest, Vol. 2, p. 103 and Tyabji's Mahomedan Law, p. 331).

I now come to the question of the Moglai Hak. It is common ground that the Mogal Government granted the revenues of certain villages which are now in the Sachin State and the grant was confirmed by succeeding Governments and recognized by the Nawab of Sachin. In the State books the Hak stood in the name of the sajjadanashin for the time being and so after the decision of the suit of 1882 by the High Court the name of Zain was entered as holder and Abdulla's claim was rejected (*see* Ex. 635). In 1900 Syed Zain raised a loan of Rs. 12,000 from the Sachin State on a mortgage of the Hak. Afterwards a further loan of Rs. 40,000 was raised on the security of Umraj and Orma, the Moglai Hak and a bungalow at Dumas. As the loan was not repaid the State proposed to forfeit the Hak, but it was ultimately settled that it should purchase it for Rs. 18,207 and keep the amount in deposit till repayment of the debt : Ex. 615. On 18th December 1915, the debt was cleared off by appropriating this sum of Rs. 18,207 towards it and by a payment of Rs. 9,000 by Syed Ali : Ex. 312. Plaintiff claims Rs. 2,275 as his share of the purchase price of the Hak alleged to have been fraudulently taken by Syed Ali. His case is that the Moglai Hak formed part of the private property of Syed Hasan. The defence is that it was wakf property and that anyhow the claim is barred by limitation.

The appellant relies on the decision of the Administrator of the Sachin State in 1889 (Ex. 635) that as Syed Zain had been declared to be the mutawalli the Hak should be entered in his name in the State records. But the Administrator did not decide and in fact refused to consider the claim of Syed Hasan's heirs to a share of the Hak. That he said, was a matter for the civil Courts. Reliance is also placed on assertions of Syed Zain and Syed Ali that the Hak was wakf property and on some, far from convincing, evidence that the debts for which the Hak was mortgaged were Durgah debts. One would naturally have expected that the question whether this Hak is private property or wakf could be decided by reference to the deeds of grant. It appears that there were two grants, one in 1670 and one in 1713. The first is not produced and there is no explanation of the omission. It should have been with the defendants. Ex. 310 is the grant of 1713. It is a grant "by way of Inam to Syed Jaffar Sadik Aidrus and his Farzandan (offspring) in consideration of the Mansab (i. e. mutawalliship)". There is no reference to any of the Durgahs, and the trial Judge is probably right in saying that it appears to be a private grant and not wakf. The difficulty is however, that the grantee Syed Jaffar apparently belonged to another branch of the Edrus family. There is no person of that name in the pedigree of the branch to which the present parties belong. Neither plaintiff nor defendants can rely upon this grant without showing how the Hak in question became the property of this branch of the family.

That it did in fact belong to the family of the parties seems to be beyond dispute. It is common ground that it was enjoyed by Syed Hasan. But he dealt with it in his will (Ex. 118) as his private property. He first provided that his heirs should be entitled to equal shares but that if the income of the Hak were required by the mutawalli he should have the enjoyment of it. But in a codicil he altered this and provided that none of his heirs should have a right to any share of the Moglai Hak as long as the mutawalli defrayed the expenses of their maintenances from the villages of the Durgahs. But in the event of his not doing so they should have the power to demand their shares in the Hak. The fact that Syed Hasan dealt with it as private property does not prove that it was so. But in para. 20 of his will, which, as I have said, was made in 1869, he has set out in great detail the circumstances in which his father and after him he himself had become owner of the Hak to the exclusion of any other heir. In the absence of any reliable evidence to contradict this we are not prepared to differ from the finding of the trial Court that the Hak was the private property of Syed Hasan. If so it is not disputed either in the trial Court or in the argument before us that plaintiff is entitled to the share which he claims, provided that his claim is not barred by time.

It was argued on behalf of the appellant that the Moglai Hak was enjoyed by the sajjadanashin adversely to plaintiff's father and plaintiff ever since 1889 when the Sachin State authorities rejected Abdulla's claim to be entered as the holder. But as I have already stated, the claim of Syed Hasan's heirs to share in the Hak was not then decided but left open. Even apart from the provisions of Syed Hasan's will (which indeed plaintiff has not relied upon in this case), the fact that Abdulla was in receipt of a maintenance allowance as long as he lived and plaintiff himself received one until 1921 makes it practically impossible in my opinion to hold that the receipt by the sajjadanashin of the whole of the Moglai Hak was in denial of their right to a share. That is to say, as long as the Hak continued to be paid annually, the plaintiff's father and plaintiff being in receipt of maintenance, there was no question of limitation. Plaintiff is claiming a share of the sale proceeds. What has to be decided is whether that claim is barred by time.

It has been conceded that the case must be governed by one of the three Arts. 62, 89 or 120. If Art. 62 applies and Syed Ali can be said to have received the sale proceeds to plaintiff's use when the debt was settled up on 18th December 1915, this suit filed in 1927 would certainly be barred. Time would run from the date of receipt of the money. It could be extended under S. 18, Limitation Act, by proof that plaintiff was fraudulently kept in ignorance of the facts. But his pleader's letter, Ex. 417, shows that he was aware of the material facts in 1920. However in my opinion, Art. 62 does not apply. In the first place there was no receipt of the money within the meaning of that Article. The Hak was capitalised in 1909 and the amount retained by the State till 1915 when it was appropriated by the State in repayment of the debt. It is argued that that can be considered a constructive receipt of the money by Syed Ali. But Art. 62 applies in my opinion to suits to recover money actually received and not to a suit like the present where plaintiff's only possible case is that the money ought to have been received and invested on his behalf and he claims payment of the value of his share out of some other fund. In the second place it has been held in 45 Mad 648[4] that a suit for money had and received does not lie by one tenant-in-common against another who has received more than his share, the appropriate remedy in such a case being an action for an account to which Art. 120 applies, unless from the facts of the case it could be inferred that the person receiving the money acted as the agent of the other, in which case Art. 89 would apply. In either case, it has been held, time would begin to run from the date when an account was demanded and refused. This Full Bench decision of the Madras High Court has been approved by this High Court in 30 Bom L R 912.[5] The authorities on the law of limitation applicable to such cases are very difficult to reconcile. It would probably be going too far to say that Art. 62 can never be applied to a suit between tenants-in-common. In 55 Bom 193[6] it was held applicable in the case of a suit to recover a share in arrears of annual sums payable out of the revenues of a village which had been received by one of the persons entitled thereto. But we have not been referred to any case in which Art. 62 has been held applicable in a case like this where it would be necessary to have recourse to a double fiction, firstly, that the money has been received by the defendant when in fact he never did receive it, and, secondly, that he received it for the use of the plaintiff when in fact he dealt with it as his own property in denial of the plaintiff's right. There is nothing to show that plaintiff consented to or was aware of the mortgage and subsequent sale of the Moglai Hak. It is alleged in the plaint that he was fraudulently kept in ignorance. The facts are not such that agency can be inferred. Art. 89 therefore cannot govern the case. But if neither Art. 62 nor Art. 89 applies, Art. 120 apparently must. If so, on the authorities to which I have referred the suit is in time. It is true that plaintiff made a demand for his share in 1920 by his pleader's letter, (Ex. 417) but apparently there was no answer to that letter. The matter was referred to the Court of Wards and there was no refusal of the demand until it was turned down by the Court of Wards in 1925. The result is that plaintiff's claim to maintenance both past and future must be disallowed and the decree of the trial Court in that respect must be set aside. The decree so far as it awards the sum of Rs. 2,275, Rs. 387-10-0 to the plaintiff will be upheld, but we reduce the rate of interest from nine per cent. to six per cent. from the date of the trial Court's decree till payment. As regards costs the order of the trial Court was that plaintiff should bear his own costs and the costs of the defendants so far as his claim was disallowed, that defendants 2 and 3 should pay half the costs of plaintiff so far as his claim was allowed and that the other half should be borne by the Court of Wards out of the estate. We are of opinion that the whole of the costs of the litigation may properly be ordered to come out of the estate. From the evidence on record it would appear that but for mismanagement by certain of the sajjadanashins there should have been an ample surplus for the payment of reasonable maintenance to members of the family and that but for this mismanagement litigation would probably have been unnecessary. We think under the circumstances that the plaintiff was justified in bringing this suit. If we were to order that he were to pay the costs so far as his claim fails, the result would probably be that he would get nothing. We accordingly order that the costs of all parties of the suit and the appeal do come out of the estate. Plaintiff has taken certain cross-objections. These either do not arise or have not been pressed. The costs of the cross-objections must be borne by plaintiff.

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[4] **Yerukola v. Yerukola, A I R 1922 Mad 150=71 I C 177=45 Mad 648=42 M L J 507 (F B).**

[5] **Govinddas v. Ganpatdas, A I R 1928 Bom 365=113 I C 173=30 Bom L R 912.**

[6] **Janardhan Trimbak v. Dinkar Hari, A I R 1931 Bom 189=131 I C 465=55 Bom 193=33 Bom L R 127.**

Wassoodew, J. — I agree with my learned brother that the plaintiff's claim to be maintained out of the income of the properties dedicated to the Edrus Durgah, particularly from the revenues of the villages of Orma and Umraj, must be dismissed. The claim is based principally on usage and custom of the institution and the terms of the grants of those villages. It has been established, and the defendants have admitted the fact, that at regular intervals monthly payments have been made by the sajjadanashin to the plaintiff and his father and other members of the family, that the orders of appointment of the sajjadanashin known as Tauliatnamas have enjoined the successor to the gadi to maintain the family and that the declarations by sajjadanashins on taking office contain a resolve to uphold the family prestige by maintaining the different members out of the income (*see* Ex. 172).

The question is whether those payments and acts are referable to a custom which has the force of law. It has to be borne in mind that a sajjadanashin is not only a mutawalli but is also a preceptor and the curator of the Durgah where his ancestors are buried. In him, particularly in the case of the Edrus family, is supposed to continue the spiritual line of the founder. The sajjadanashin has wide powers in the management of the wakf properties and also over the surplus income therefrom: *see* 48 I A 302.[2] Normally speaking the sajjadanashin would be justified in appropriating the surplus, after satisfying the needs of the Durgah and himself, for the maintenance of the needy members of his family. My learned brother has dealt exhaustively with the various grants and Firmans to illustrate the view that the references therein made to the maintenance of the Rozas and the descendants of the Syed or sajjadanashin, do not curtail the power of the sajjadanashin to utilise the surplus of the income according to his absolute discretion. It is sufficient for me to say that those documents do not support the plea that the grants relating to the villages of Umraj and Orma are essentially for the maintenance of the family members of the sajjadanashin or the grantee. Primarily those grants are for the Rozas and Durgahs and therefore clearly wakf.

In the view I take of the evidence, the payments made are referable to the exercise of the wide discretion of the sajjadanashin and not to any right based on custom. In order to give effect to such a custom it must be established that it is invariable and reasonable. The evidence discloses that payments were made to Abdulla and his son on account of their destitute condition. The rates of monthly allowances allowed have admittedly varied perhaps according to the needs of the parties and the surplus then available. In many cases there are agreements of the family members whereunder payments were made to them. If the whole income were to be devoted to the maintenance of this growing family, it is reasonable to suppose that very little would be left to meet the needs of the Durgah and the sajjadanashin. The Court in countenancing such payments would be destroying the object of the foundation. The sajjadanashin is not a mere functionary or an ordinary trustee. He has always been regarded as an integral part of the institution and his maintenance according to the dignity of his position, having regard to the terms of the various Firmans read over to us, has been the main purpose of the endowments. As my learned brother has pointed out, some of the Tauliatnamas emphasize his unlimited control over the income. It seems to me therefore the evidence falls short of the degree of proof required to establish the custom of the kind alleged which could be enforced by a civil Court's decree.

With regard to the Moglai Hak it is clear to me that it cannot be regarded as the property of the wakf. The only document (Ex. 310-A) bearing directly on the point does not contain any reference to a grant to the Durgah of the Edrus and it has been discovered in the course of argument that the grantee is not directly connected with Syed Hasan's branch. Prima facie having regard to the language of that document the grantee acquired a hereditable and transferable interest in the subject matter of the grant. How that Hak was acquired by Syed Hasan and his predecessor is not made clear. But inasmuch as it is not wakf it is reasonable to suppose that in the hands of Hasan and his successors it was personal as distinct from wakf property. In that view the descendants of Syed Hasan would be entitled to participate in it. We were referred to the will left by Syed Hasan, but there is nothing in it which could be regarded as derogatory to the claim of the plaintiff. Consequently the plaintiff is entitled to a share in it.

The question is whether the claim of the plaintiff is in time. That question is not free from difficulty. It was conceded in the course of argument that the only Articles which could possibly apply to such a claim are Arts. 62, 89 and 120. Art. 62 relates to suits for money received by the defendant for the plaintiff's use. It is worth observing that in somewhat similar circumstances the Full Bench of the Madras High Court in 45 Mad 648[4] held that Art. 62 had no application. There are numerous decisions of the different High Courts in India which show that in a case of a debt collected by one of several tenants-in-common Art. 62 will not apply. There are also decisions to the contrary. It seems to me difficult to hold, having regard to the technical expression used in Art. 62, that it could be applied to a case where the defendant who collects the money has no express duty to hand over the entire sum to the plaintiff. Upon the record it is not possible to say that Syed Zain and Syed Ali had received the Hak or its capitalised value with the consent of the co-sharers, so that they could be considered as having acted as agents of the co-sharers. Consequently Art. 89 has no application. The only Article therefore that could be applied is Art. 120. Under that Article time would begin to run from the date when the account was demanded and refused; *see* 45 Mad 648[4] and 45 Bom 313.[7] The difficulty is, in this case, as to the precise time when the account was in fact demanded from the defendant. Very little attention seems to have been paid to that aspect of the case in the trial Court. It has been urged before us that Syed Zain held it adversely to Abdulla, that he claimed it as his own and that since the decision of the suit of 1882 in the year 1889 the plaintiff's title has been defeated by adverse possession. Now the onus of proving an adverse title rests entirely on the defendant. There are good reasons for holding that that onus has not been satisfactorily discharged. Reference has been made to the letter of 1889 (Ex. 635) by the Administrator of Sachin showing that he refused to enter Abdulla's name as a person claiming to be entitled to be the holder of the Hak and preferred to follow the decision of the Court in regard to Syed Zain's claim. That conduct does not establish an adverse title to the Hak, for since then regular payments have been made to Abdulla and there is no indication from the record that that payment was made out of a particular fund unconnected with this Moglai Hak. The subsequent conduct in permitting the Hak to be capitalised and utilised for the liquidation of the Durgah debt does not help the defendant. For the first time in 1920 the plaintiff by his notice (Ex. 417) made a claim to the Hak and also complained of the clandestine manner of the recovery of the entire capitalised value of the Hak from the Sachin State Treasury. That could perhaps be regarded as the starting point for limitation, if there was prompt denial of that claim. My learned brother has pointed out that having regard to the subsequent conduct of the parties it cannot reasonably be held that, when no definite denial was made in 1920 to the claim in the notice, there was refusal of the demand of the plaintiff. Consequently the claim was not barred under Art. 120 when the suit was instituted on 9th August 1927. I therefore agree with the order proposed.

B.D./D.S. *Decree modified.*

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[7] Gabu v. Zipru, A I R 1921 Bom 384=59 I C 357=45 Bom 313=22 Bom L R 1289.

* A. I. R. 1937 Bombay 225

BEAUMONT, C. J.

S. H. Patel — Applicant.

v.

Husseinbhai Mahomed — Opponent.

Civil Revn. No. 500 of 1935, Decided on 11th November 1936, against decision of Small Cause Court, Bombay.

*** Partnership Act (1932), S. 69 (1) and (2) —Sub-ss. (1) and (2) cover suits relating to dissolved firm — Suit in respect of right acquired by partner—Firm need not be in existence on date of suit.**

The language of sub-ss. (1) and (2), S. 69, Partnership Act, is wide enough to cover suits relating to a dissolved firm and sub-s. (1) covers a suit by a plaintiff suing in respect of a right vested in him or acquired by him as a partner in a firm and it is not essential that the firm should be actually in existence at the date when the suit was instituted. [P 226 C 1]

V. R. Laud — for Applicant.

V. B. Karnik — for Opponent.

Order.—This is an application in revision against an order dismissing the plaintiff's suit made by a Judge of the Small Cause Court, Bombay, and the basis of the application is that the learned Judge refused to exercise a jurisdiction which was vested in him. The facts are that the plaintiff and the defendant were partners in a business carried on in the name of the Union Trading Agency, and that the partnership was dissolved in August 1934. The accounts were then made up, and the defendant paid to the plaintiff a sum of Rs. 600 odd on account of the income-tax which it was estimated the firm would be liable for. Subsequently an assessment was made against the plaintiff on account of the Union Trading Agency for income-tax for the year ending 31st March 1934. The assessment was for Rs. 3,400 odd. The plaintiff paid the whole amount, and he now sues the defendant for half the amount, giving credit for the sum of Rs. 600 odd already paid by the defendant. The learned Judge held that the suit did not lie, having regard to S. 69, Partnership Act.

The plaintiff's first contention is that he is entitled to recover this sum against the defendant not in respect of a partnership, but as being moneys paid to the use of the defendant, and recoverable under S. 70, Contract Act, and that S. 69, Partnership Act, has no application. That argument might perhaps have prevailed, had the assessment been made on the plaintiff and defendant by name, so that the assessment showed on the face of it that the defendant was liable for a part of the amount of tax charged. But the assessment is not made against the defendant by name, and in order to establish any right of action against the defendant it seems to me that the plaintiff must rely on the partnership. He must show that the defendant was a partner in the firm referred to in the assessment, and was liable in that capacity for a half share of the tax. Therefore, so far as that point is concerned, I think the learned Judge was right in holding that the case fell under S. 69, Partnership Act. The next point taken by the applicant—and in view of the absence of any authority on the construction of S. 69, it is a point of some general importance,—is that the provisions of S. 69 only apply where the suit is brought by or on behalf of a person suing as a partner in an existing firm and does not cover the case of a dissolved firm. It is pointed out that so long as a firm is existing, it can be registered under S. 58 of the Act, and any difficulty arising under S. 69 can thus be overcome, but that if the latter section applies to a dissolved firm, the bar imposed by S. 69 becomes absolute at the date of dissolution. It is suggested, therefore, that the Legislature may well have intended that the bar should only apply to suits in relation to an existing firm. Sub-s. (1) of S. 69 is in the following terms :

> No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

Sub-s. (2) provides as follows :

> No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

On the construction of those two subsections, if they stood alone, it might, I think, be held that they cover only suits relating to firms. But then one has to notice the language of sub-s. (3) which provides, so far as material that the provisions of sub-ss. (1) and (2) shall not affect (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm. It seems to me clear, therefore, that the Legislature contemplated that the language of sub-ss. (1) and (2) is wide enough to cover suits relating to a dissolved firm. Reading the section as a whole, in my opinion, sub-s. (1) covers a suit by a plaintiff suing in respect of a right vested in him or acquired by him as a partner in a firm, and that it is not essential that the firm should be actually in existence at the date when the suit was instituted. In my judgment, therefore, the decision of the learned Judge was right, and the application must be dismissed with costs.

B.D./D.S. *Application dismissed.*

A. I. R. 1937 Bombay 226

BROOMFIELD AND TYABJI, JJ.

Ahmedabad Ginning and *Manufacturing Co., Ltd.*—Plaintiffs—Appellants.

v.

Secretary of State — Defendant — Respondent.

First Appeal No. 155 of 1930, Decided on 6th August 1936, against decision of First Class Sub-Judge, Ahmedabad, in C. S. No. 1358 of 1928.

(a) Bombay Land Revenue Code (5 of 1879), Ss. 45, 48, 52, 102 and 106—Land appropriated to non-agricultural purposes with permission of Government on payment of fine—Mere fact that assessment has not been altered does not limit Government's power to revise assessment—Assessment fixed remains same on expiry of period of guarantee until revised—Revised assessment cannot be levied retrospectively.

The mere fact that the non-agricultural assessment has not been previously levied upon land converted to non-agricultural purposes with permission of Government and on payment of fine does not imply any limitation on the prerogative of the Crown to assess land to land revenue and to revise the assessment periodically according to law. [P 228 C 2]

The assessments fixed at a survey settlement do not cease to operate at the expiry of the period of guarantee unless and until they are revised. [P 229 C 2]

The Collector has no power to levy revised assessment retrospectively: *9 Bom 483* and *26 Bom 449, Ref.* [P 230 C 2]

(b) Bombay Land Revenue Code (5 of 1879), S. 48, Cl. (1)—Interpretation—Cl. 1 lays down conditions for operation of Cl. 2.

Section 48, Cl. (1), Bombay Land Revenue Code means that assessments are to be made in future and shall be deemed to have been made in the past with reference to the use of the land. It may also mean that whether assessments are actually fixed with reference to the use of the land or not, they shall be deemed to have been so fixed. But in any case Cl. (1) lays down the conditions for the operation of Cl. (2). [P 230 C 1]

G. N. Thakor and *P. A. Dhruva* — for Appellants.

P. B. Shingne — for Respondent.

Broomfield, J. — The main Appeal No. 155 of 1930 is an appeal by the Ahmedabad Ginning and Manufacturing Co., Ltd., commonly known as the Madhubhai Mills, against a decree of the First Subordinate Judge, Ahmedabad, dismissing a suit for refund of Rs. 15,581-5-7 alleged to have been illegally recovered as non-agricultural assessment on lands belonging to the company for the years 1925-1926 to 1927-1928, and for an injunction against the recovery of this assessment in future. The question involved is whether Government had the right to levy non-agricultural assessment at the rate of Rs. 200 per acre on these lands which were appropriated to non-agricultural purposes with the permission of Government on payment of fine.

The plaintiff company owned seven survey numbers in Sherkotda, a suburb of Ahmedabad, which were originally assessed as agricultural lands. At various times between 1863 to 1894 these survey numbers or portions of them were permitted to be applied to non-agricultural usage, that is, the company was allowed to erect mill buildings on them. Fines of varying amounts were imposed ranging from 30 to 133 times the agricultural assessment. The learned counsel for the appellants has prepared a statement from the evidence on the record giving details of the various plots with the date of conversion to non-agricultural purposes, etc. This statement is appended at the end of this judgment. It may be mentioned that the total area of the lands in question amounts to about 25 acres and the charges levied by Government for putting the lands to non-agricultural use amounted in all to Rs. 20,512. We have no information about the case mentioned first in the statement. It is not known whether Government levied a fine, or, if so, what the fine was. The law in force at that time was Regn. 17 of 1827. S. 2 of that Regulation provided that all land was liable to pay revenue according to its kind, unless specially exempted. Under S. 4 it is provided that if the right of assessment is unlimited, the Collector shall fix it under the control of Government; where there is a limit, it must not be exceeded, and the right of Government to institute, at any time when it may appear expedient, new and specific rules regarding assessment was not to be affected. The next two cases in the statement were governed by Act 1 of 1865, S. 35 of which provides as follows :

> It is hereby declared that an occupant of any Government land is entitled, in virtue of his occupancy, to erect farm buildings, etc., for the better cultivation of the land. But if an occupant wishes to appropriate the land in his occupancy to any purpose unconnected with agriculture, so as to destroy or injure it for cultivation, he shall first obtain the Collector's permission, which shall be given on payment of a fine fixed according to such rules as may from time to time be prescribed under the orders of the Governor-in-Council, and on entering into a written agreement to pay, in addition to such fine, the annual assessment which may have been fixed on such land at the settlement then current, and which shall remain liable to revision at any future settlement of the District.

In the case of appropriation of land for purposes unconnected with agriculture therefore the Collector had power to levy a fine, and the agricultural assessment was to continue for the period of the current settlement. That meant in effect in this particular case thirty years from 1860, which was the date of the first revenue settlement in Ahmedabad. After that the assessment was liable to revision, and this did not mean merely revision on an agricultural basis : *see* 42 Bom 126.[1] All the remaining cases in the statement were after the introduction of the Bombay Land Revenue Code, Bombay Act 5 of 1879; five of them during the currency of the settlement of 1860, and the rest after the first revision settlement which was introduced with effect from the revenue year 1889-90. S. 65 of the Act and Rr. 56, 67 and 68 provided for the levy of fines and the imposition of altered assessment in cases where the lands were converted to non-agricultural usage. The rules made under the Code in 1881 were amended in 1905, after which date altered assessment only was leviable, and fines only in exceptional cases : *see* Rr. 71 to 75 of the amended rules of 1881, and Rr. 99 to 102 of the rules of 1921 now in force. At the material time, however, that is to say, when the lands with which we are concerned were allowed to be converted for building purposes, the Bombay Land Revenue Code allowed both the imposition of fine and the levy of altered assessment. Under the Regulation of 1827 and the Act of 1865 there was no provision for altered assessment, the agricultural assessment being continued for the period of thirty years' guarantee, that is until 1890. After the introduction of the Bombay Land Revenue Code altered assessment was leviable, as I have said, in addition to fine, but in fact the assessment on these lands was not altered, and the old agricultural assessment continued to be levied until the introduction of the first revision settlement of 1889-90. At that time the lands were re-measured and re-assessed by the survey officer. Apparently, so far as the entries in the Settlement Record Village Form No. 1 go, this was done on an agricultural basis —the assessments were imposed on the various plots of lands as though they were cultivable Jirayat or dry crop lands.

In March 1924, the Collector of Ahmedabad wrote to the plaintiff calling for plans of the buildings standing on these survey numbers, and stating that the buildings had been erected without permission. This letter was apparently written under a misapprehension. Correspondence ensued, and on 4th May 1927, the Commissioner made an order, directing the Collector to take steps to revise the non-agricultural assessment for these lands under Ss. 48 and 52, Bombay Land Revenue Code. In consequence of this order, the Collector on 17th June 1927, made a demand for payment of altered assessment at the rate of Rs. 200 an acre, from the revenue year 1919-20 to date. The demand was made according to the standard rate fixed by the rules then in force for agricultural lands converted to non-agricultural usage : Ch. 14 of the rules of 1921. On an appeal to the Commissioner, that officer directed that the revised assessment should only be levied from the date on which the old guaranteed period expired and the new settlement was introduced. I should mention that the second revision settlement came into force in October 1927, but the lands in suit were excluded from this settlement which was confined to agricultural lands. The amount demanded by the Collector was paid under protest, and the plaintiff filed the suit from which this appeal arises.

The first argument of the learned counsel for the appellant is that there was an implied agreement on the part of Government that the assessment would not be altered. He says that when Government accepted a heavy fine from the plaintiff for the conversion of the lands to building purposes they waived the right to levy an altered assessment, otherwise the altered assessment would have been levied at once, or at any rate, when the original period of guarantee came to an end. It is not open to Government, according to the learned counsel, now that fines have been abolished in ordinary cases, and altered assessment levied instead, to levy an altered assessment in addition to the fine already recovered. There is nothing on record to show why the assessments were not put on a non-agricultural basis at the first revision settlement, in the case of the lands converted before the Land Revenue Code came into force, nor why, in the case of lands converted after that, the assessment was not altered either at once or at the first revision. On the other hand, there is nothing on the record to suggest that there was any guarantee given to the plaintiff, that the assessment would not be revised. The Regulation of 1827, the Act of 1865, and the Bombay Land Revenue Code all reserved the powers of revising assessments after the period of guarantee, if any. I need only on this point refer to S. 45 of the Code which lays down that all land, whether applied to agricultural or other purposes, and wherever situate, is liable to the payment of land revenue to Government *according to the rules*, except such as may be wholly exempted under the provisions of any special contract with Government or any law for the time being in force. In 9 Bom 483,[2] it was held that strict proof must be given of any right set up in derogation of the inherent right of the Sovereign to assess the land at his discretion. Scott, J. cited an observation of Lord Stowell in 1 C Rob 227[3] at p 230 :

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[1] Mahmadbhai Dosabhai v. Secretary of State, A I R 1917 Bom 57=43 I C 744=20 Bom L R 22=42 Bom 126.

> The prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away. [p. 490 of 9 Bom].

In 26 Bom 339,[4] Chandavarkar, J. said at p. 350 :

> When a person acquires a land from the Crown, he acquires it subject to the paramount right of the Crown to assess it for the purposes of revenue from time to time, according to the exigencies of administration, unless by the grant the Crown has exempted the land from the liability. If it is not so exempted, the liability remains.

These were both cases under a special Act, Bombay City Land Revenue Act (Act 2 of 1876), but the observations I have cited have a general application. It would, in my opinion, be obviously opposed to principle to imply, from the mere circumstance that the non-agricultural assessment has not been previously levied, any limitation on the prerogative of the Crown to assess the land to land revenue, and to revise the assessment periodically according to law. This part of the appellant's case has, I think, no force in it; nor is there any force in the alternative argument put forward by the learned counsel for the appellant, that the assessment of these lands must be presumed to have been guaranteed for 99 years or at least for 50 years. The basis of this argument is R. 25, Bombay Land Revenue Rules of 1881, R. 56 of the same rules as amended in 1905, and S. 102, Bombay Land Revenue Code. R. 25 provided :

> Occupancies of building sites shall ordinarily be disposed of for 99 years, subject to an annual ground rent.

It would appear from the other provisions in the rule that it was intended to apply to sites in hill stations and in the residential parts of large cities. There may be a question, therefore, whether this rule could have any application to the lands in suit. However that may be, there was no disposal for 99 years in any of these cases. If the ordinary rule had been applied, there might have been a guarantee for 99 years. But in the absence of any sanad or agreement or general or special orders applicable to these lands, one cannot infer any such guarantee. Similar considerations will apply to S. 102 of the Code, which provides that after the assessments have been fixed by the Officer in charge of the Survey, the Governor in Council may declare the assessments fixed for a term of years not exceeding 30, in the case of lands used for the purposes of agriculture alone, and not exceeding 99 in the case of all other lands. It does not appear that there was at any time any declaration in respect of the suit lands. As for R. 56, the amendment prescribing 50 years as a normal period of guarantee in the case of lands converted to non-agricultural usage was only made in 1905. It was not retrospective. The rule in force at the material time said nothing about 50 years. But though it is impossible to imply either an agreement that the agricultural assessment would be maintained in perpetuity or a guarantee for any period longer than 30 years at the most, that does not dispose of the case. The question still remains whether the Collector had power to impose this new assessment under the Bombay Land Revenue Code and the rules thereunder. The rules under which the assessment was actually levied are rules passed with reference to S. 48 of the Code. It is conceded that it must be leviable, if at all, either under that section or under S. 52. I will deal with the latter section first, because the learned Judge seems to have considered that to be the main foundation of the Collector's order. S. 52 is as follows:

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[2] Shapurji Jivanji v. Collector of Bombay, (1885) 9 Bom 483.

[3] The Rebeckah, (1800) 1 C Rob 227.

[4] Vinayak v. Collector of Bombay, (1901) 26 Bom 339=3 Bom L R 910.

> On all lands which are not wholly exempt from the payment of land revenue, and on which the assessment has not been fixed under the provisions of S. 102 or S. 106, the assessment of the amount to be paid as land revenue shall, subject to rules made in this behalf under S. 214, be fixed at the discretion of the Collector, for such period as he may be authorised to prescribe, and the amounts due according to such assessment shall be levied on all such lands.

If these lands can be assessed under this section, it is clear that the matter is left to the Collector's discretion, no rules having been made under S. 52, and there would be nothing to prevent him from imposing the standard rates leviable under S. 48 or any other rates. But S. 52 only applies where no assessments have been fixed under S. 102 or S. 106. These sections are as follows:

> *102.* The assessment fixed by the officer in charge of a survey shall not be levied without the sanction of Government. It shall be lawful for the Governor in Council to declare such assessments, with any modifications which he may deem necessary, fixed for a term of years not exceeding 30 in the case of lands used for the purposes of agriculture alone, and not exceeding 99 in the case of all other lands.
>
> *106.* It shall be lawful for the Governor in Council to direct, at any time, a fresh revenue survey or any operation subsidiary thereto, but no enhancement of assessment shall take effect till the expiration of the period previously fixed under the provisions of S. 102.

It would seem that the former section would ordinarily apply to an original survey, and the latter section to a revision survey. The orders of the survey officer in 1889-90, when he re-measured and re-assessed the suit lands, may be said to have been passed either under S. 102 or S. 106, inasmuch as there had been a previous settlement. But it is quite clear at any rate that they were passed under one section or the other. The learned Government pleader tries to get out of the difficulty by saying that the assessments fixed at the first revision settlement were only guaranteed for 30 years, and therefore in 1927' there was no assessment fixed under S. 102 or S. 106 in respect of the suit lands which, as I have said, were excluded in the second revision settlement. But the assessments fixed at a survey settlement do not cease to be operative at the expiry of the period of guarantee unless and until they are revised. The assessments fixed by the survey officer in 1889-90 were still in force in 1927 so far as the suit lands were concerned. Therefore the Collector had no power to act under S. 52. S. 48 is in these terms:

> (1) The land revenue leviable on any land under the provisions of this Act shall be assessed, or shall be deemed to have been assessed, as the case may be, with reference to the use of the land: (a) For the purpose of agriculture; (b) for the purpose of building, and (c) for a purpose other than agriculture or building.
>
> (2) Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provisions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the Governor in Council may prescribe in this behalf.

The present section was substituted for the original one which was rather differently worded by an amending Act in 1913. But the power of Government to levy altered assessment in 1927 must obviously depend on the law as it stood at that date. In order to ascertain whether the Collector had power to alter the assessments under Cl. (2), we have first to apply Cl. (1) and see whether the lands with which we have to deal are to be deemed to have been assessed for the purpose of agriculture, or for the purpose of building. It is only if they are deemed to have been assessed for the purpose of agriculture that the assessment would be liable to be altered by reason of change of use. In this connection it appears that we have to make a distinction between the lands which were converted to a non-agricultural use before the assessments were fixed in 1889-90 and those which were converted after that. In the former case, the lands were admittedly used for building purposes when the assessments were fixed. According to Cl. (1), S. 48 therefore they are deemed to have been assessed with reference to the use, that is for the purpose of building, and they were not liable to altered assessment in 1927, there having been no subsequent change of use. I mean, of course, they were not liable to have the assessment altered by an order of the Collector under S. 48 (2). The assessment presumably might have been revised if the lands had been included in the second revision settlement, or may be revised still if a fresh survey should be directed. That is a matter which does not concern us in this case. On the other hand, as regards the lands which were converted after the year 1889-90, Cl. (2), S. 48 seems clearly to apply. They were agricultural lands when the assessment was fixed and were assessed with reference to that use. The use was subsequently changed and therefore the assessments fixed under the Act by the survey officer were and are liable to be altered by the Collector.

The learned Government pleader's argument in this connection is that Cl. (1) makes a distinction between assessments which are actually made and assessments which are to be deemed to have been made with reference to the use of the land, and he says that Cl. (2) only refers to the first kind of assessments. I cannot accept this view. Possibly there may be some ambiguity about Cl. (1). It clearly means that assessments are to be made in future and shall be deemed to have been made in the past with reference to the use of the land. It may also mean that whether assessments are actually fixed with reference to the use of the land or not, they shall be deemed to have been so fixed. But in any case Cl. (1) lays down the conditions for the operation of Cl. (2). I cannot agree that it deals with two categories of cases, only one of which is dealt with by Cl. (2) and the other not at all. Mr. Thakor for the appellant argues that Cl. (2), S. 48 does not apply even to lands converted after the first revision settlement. He says that when the Collector levied a fine and did not alter the assessment, the land must be deemed to have been at that time, that is at the date of the Collector's order, assessed for building purposes so that there was no change of use after the lands were assessed. In my opinion that is not a tenable view. If the Collector fixed the assessment it would not be an assessment fixed under S. 102 or S. 106, so that in that case S. 52 might be applied. But as a matter of fact the Collector did not fix any assessment at all. The assessment as fixed by the survey officer remained in force.

The appeal succeeds therefore as regards all the lands converted before the assessment fixed at the first revision settlement came into force and fails as regards the others. That is as regards the main question of liability to altered assessment. But the appellant challenges the right of Government to recover altered assessment retrospectively in respect of any of the lands. The Collector's order fixing the new assessments was passed in June 1927. They have been recovered for the years 1925-26, 1926-27 and 1927-28. It is contended, and I think rightly, that there is no right of recovery for the first two years. As I have said already in another connection, the assessments fixed at the first revision continued in force until revised, that is until June 1927. No authority has been referred to in support of the Collector's power to levy revised assessments retrospectively. On the other hand 9 Bom 483[2] is against it. The plaintiff therefore is entitled to the refund of the whole amount recovered in respect of the years 1925-26 and 1926-27, and to the refund of the amount recovered for 1927-28 in respect of the lands converted on 2nd February 1863, 14th February 1877, 17th August 1877......1883, 14th March 1883, 29th November 1886, 4th April 1887 and 27th May 1888, that is the first eight plots in the appended statement A. He is also entitled to interest on this amount at six per cent.

· Appeal No. 156 of 1930 is a companion appeal raising the same questions. The plaintiff in this case is the Maneklal Harilal Spinning and Manufacturing Company Ltd., Ahmedabad. The suit was to recover Rs. 5,010 levied by way of non-agricultural assessment for the years 1925-26, 1926-27 and 1927-28. The appended statement B gives the details of the plots in question. The first three of them were converted to building purpose prior to the first revision settlement and the last three afterwards. For reasons already given the plaintiff is entitled to the refund of the whole amount recovered for the years 1925-26 and 1926-27 and to the refund of the amount levied for 1927-28 in respect of the lands converted on 6th April 1889, and 20th April 1889, that is, the first three plots in statement B. As regards the prayers for injunction, plaintiff in each case is entitled to the injunction prayed for in respect of the plots for which the assessment is ordered to be refunded for the year 1927-28. The injunction will be only against recovering the altered assessment by the Collector under S. 48 or Section 52. Decree to be drawn up in accordance with these findings in substitution for the decrees of the trial Court. The plaintiff in each case will get two-thirds of his costs from Government in both Courts.

Tyabji, J.—I agree. It is argued that under the Bombay Land Revenue Code, 1879, S. 48, sub-s. (1), the assessment must be deemed to continue to be agricultural assessment. Mr. Thakor contended that this argument was not open to the defendant as he had in his written statements pleaded that the assessment had been altered from agricultural to building assessment. It is true that in para. 7 of the written statement in Suit No. 1358 of 1928 out of which Appeal No. 155 arises, it is stated that altered assessment was levied under R. 56 of the Land Revenue Rules of 1881. Similarly in the other suit, it is stated in para. 3 that no agreement showing the period of guarantee of altered assessment was made, and altered assessment equal to agricultural assessment only was being levied up to 1925-26; and in para. 5 that on those portions of the land on which permission to erect building was granted in 1891, altered assessment equal to agricultural assessment was levied under the rules in addition to fines. But these averments imply that the revision of the assessment was on the basis of the land being used for building purposes, and that the assessment was altered from agricultural assessment to building assessment, although the amount of building assessment was allowed to stand at the same figure at which the agricultural assessment had stood. Mr. Thakor's contention therefore cannot be upheld.

S C./D.S. *Order accordingly.*

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N. J. WADIA AND SEN, JJ.

Dharwar Urban Co-operative Bank Ltd. — Appellant.

v.

Ramchandra Govindrao Alnavar and *others* — Respondents.

First Appeals Nos. 109 and 110 of 1931, Decided on 17th August 1936, against decision of Joint First Class Subordinate Judge, Dharwar, in Special Civil Suit No. 104 of 1929.

(a) Bombay Co-operative Societies Act (7 of 1925), S. 57 — Award by arbitrators, or decision by Registrar or his nominee cannot be questioned in civil Court — Question that there has been fraud or undue influence in transaction involved in reference to Registrar cannot be raised in civil Court.

The terms of Section 57, Bombay Co-operative Societies Act, prima facie show that award of the arbitrators or a decision by a Registrar or his nominee cannot be called in question in any civil Court. So when a question arises as to whether there has been undue influence or fraud in any transaction involved in the reference to the Registrar under the Act, that would be a question for the arbitrator to decide and would not therefore be a matter into which a civil Court would be competent to inquire under S. 9, Civil P. C., read with S. 57 of the Act. It will not be even open to a civil Court to go behind that award and to call in question any matter which might have arisen in connexion with the decision of dispute which necessitated that award : *A I R 1926 Bom 352* and *A I R 1935 Bom 91*, *Rel. on* ; *Case law discussed.* [P 233 C 2 ; P 234 C 1, 2]

(b) Bombay Co-operative Societies Act (7 of 1925), S. 54 — Scope — Debts due from member of Co-operative Society — Award under Act as to part of loan — Civil Court has no jurisdiction to call in question part of loan not covered by award — Jurisdiction of civil Court is also impliedly barred under S. 9, Civil P. C.

The word 'include' in para. 2, S. 54, Bombay Co-operative Societies Act, shows that the paragraph is not meant to be an exhaustive definition of a dispute. It cannot therefore be restricted to the disputes only, wherein claims are made by the Society for debts or demands due to it from the member concerned. The civil Court has no jurisdiction therefore to call in question that part of the loan which is not dealt with in the award under the Act. The jurisdiction of the civil Court is also impliedly barred under S. 9, Civil P. C., even as to the part of the loan not covered by the award, as all disputes relating to the loan and of the nature described in the first part of S. 54, are to be referred to the Registrar or arbitration as stated in it. [P 235 C 1, 2]

(c) Bombay Co-operative Societies Act (7 of 1925), S. 70—S. 70 is mandatory and want of notice prevents Court from entertaining suit — Failure to raise objection of want of notice does not raise presumption of waiver by Registrar of such notice.

The terms of Sec. 70, Bombay Co-operative Societies Act, are mandatory and when the requisite notice under S. 70 has not been given before the institution of a suit to set aside a transaction involved in the reference to the Registrar on the ground of undue influence or fraud, such an omission prevents the Court from taking cognizance of the dispute involved. And simply because the defendant has not raised any objection on the ground of want of notice, it cannot be said that the Registrar has in fact waived the requisite notice: *34 Cal 257*; *A I R 1927 P C 176*; *A I R 1931 Cal 503* and *A I R 1935 Bom 123*, *Rel. on*; *Case law discussed.* [P 236 C 1, 2]

G. P. Murdeshwar — for Appellant.

R. A. Jahagirdar — for Respondents.

Sen, J.—These are two appeals against the decree of the First Class Subordinate Judge of Dharwar in Special Suit No. 104 of 1929. The facts in this case are as follows: In 1899 there appears to have been a partition in the family of the plaintiffs wherein Shitabai, the mother of Govindrao, plaintiffs' father, got gold ornaments weighing 166-10-0 tolas of gold as stridhan. Later on as the plaintiffs' father Govindrao made use of these ornaments in the course of his business, he sold to his mother Shitabai the suit property and certain lands on 26th February 1916. This property was declared as belonging to Shitabai in Suit No. 639 of 1920. Govindrao however had to apply in insolvency in 1916, his debts amounting to Rs. 17,000 to Rs. 18,000. In 1917 Shitabai passed a will in favour of her grandsons, the plaintiffs, to whom she bequeathed all her moveable and immoveable property. In the insolvency case Govindrao arrived at an understanding with his creditors, and on 2nd December 1919, the Court sanctioned a composition scheme whereby the creditors were to receive three annas in a rupee. The defendant in the present suit, the Dharwar Urban Co-operative Credit Society, was one of the creditors, and Govindrao was to pay to this Society Rs. 242-4-0 out of a debt of Rs. 1,291-15-0.

The next fact we have got is a mortgage deed, Ex. 80, purported to have been passed by Shitabai on 23rd March 1920, mortgaging the suit property with the Society for Rs. 8,800, the loan being repayable by ten equal annual instalments. On the same date, that is, on 23rd March 1920, the bank also took a simple bond from Shitabai for the same amount, and the three plaintiffs by their guardian mother Ramabai undertook to be jointly and severally liable to the bank for the due payment of the loan with interest. Under the composition scheme of 1919 Govindrao had to deposit a sum of Rupees 3,331-9-6 in Court. He did this two days after the date of the mortgage deed, that is, on 25th March 1920. The defendant Society sought to recover the first three instalments due under the mortgage deed by applying to the Registrar of Co-operative Societies, and on 20th April 1924, an arbitration decree was passed under the Co-operative Societies Act, entitling the Society to recover the claim of Rs. 5,048-8-8 with costs and future interest either personally from the defendants or by sale of the mortgaged property in the hands of the said defendants. The defendants in that case were shown thus: (1) Shitabai *kom* Ramchandra Venkatesh, (2) Ramchandra Govindrao, (3) Bhimaji Govindrao, (4) Madhavrao Govindrao, (5) Ramabai *kom* Govind.

This application for arbitration was made under the Co-operative Societies Act 2 of 1912, and the rules framed thereunder. In 1926 the Bank made another application to the Registrar in respect of three other instalments due in March 1926, and there was another arbitration award, this time under the Bombay Co-operative Societies Act 7 of 1925. On 31st October 1927, the plaintiffs filed the present suit wherein they alleged *inter alia* that when the mortgage deed, Ex. 80, was passed, Shitabai was not in need of money, that the amount was in reality required by Govindrao himself, that Shitabai could not have given her free consent to the transaction, that she had been unconscious at the time and could not have understood the nature of the transaction, that the deed was accordingly fraudulent and that the debt was not binding on the plaintiffs. They prayed *inter alia* that the Court should declare that the transaction evidenced by Exs. 80 and 85 was hollow for want of executant's free consent and on account of undue influence and fraud and therefore was not binding on the plaintiffs personally or as Shitabai's heirs. They further prayed that the arbitrators' awards should be declared void not only on the above grounds but also because of gross negligence of their mother in the Court of the arbitrators and that the Court should issue a permanent injunction restraining the defendant Society from executing the said awards. Lastly, they prayed that if the above claims were not tenable in the case of plaintiff 1, the Court should declare that the debt did not bind plaintiffs 2 and 3 or their rights in the suit property. The main defence of the defendant Society was that the suit to set aside the awards made under the Co-operative Societies Act was not maintainable, that the transaction in suit was not vitiated by want of Shitabai's free consent or undue influence or fraud, and that the suit was barred by limitation. In this Court the defence as to limitation has not been argued and certain issues raised in the lower Court viz. issues 2, 4 and 5 which related to the claim against the plaintiffs personally, were not pressed. There was one issue raised in the lower Court, viz. issue 6: "Were plaintiffs members o fthe Society?", on which the learned Subordinate Judge has remarked:

> This issue is not pressed because under S. 54, Co-operative Societies Act, a dispute referred to therein includes a claim by the Society for debts or demands due to it from a member or the heirs or assets of the past member.

The learned Subordinate Judge set aside two bonds, Exs. 80 and 85, in respect of the last four instalments so far as the said bonds related to the interests of plaintiffs 2 and 3 and also set them aside wholly so far as they related to the personal liability of all plaintiffs and dismissed the rest of the plaintiffs' suit. Both the plaintiffs and the defendant Society have appealed. The main point argued by the learned advocate for the defendant in these appeals was that the suit was barred under the provisions of Ss. 54, 57 and 70, Bombay Act 7 of 1925 and under Rules 28 and 33 made under S. 43 of Act 2 of 1912. I would observe that in the defendant's written statement there appears no reference to the Co-operative Societies Act, and that issue 1 raised in the lower Court is in these terms: "Whether a suit lies to set aside the award made by the arbitrator appointed under the Co-operative Societies Act". This issue, therefore, refers to the award of the arbitrator under S. 57, Bombay Act 7 of 1925. The learned Subordinate Judge, however, considered the applicability of S. 54 but not altogether in the manner in which the learned advocate for the defendant has sought to apply that section in this case. The judgment of the learned Subordinate Judge, again, has made no reference to the earlier India Act 2 of 1912 nor to the rules made thereunder. As the earlier arbitration award of 1924 was passed before the passing of Bombay Act 7 of 1925, the Act which would apply to that award would be India Act 2 of 1912; and Mr. Murdeshwar has accordingly based his arguments so far as they relate to this award on the earlier Act and the rules made thereunder. His reference to S. 70, Bombay Act 7 of 1925, however, was made for the first time in this Court. Neither in the lower Court nor in the memorandum of appeal has the defendant sought to base his case on this section. We have, however, allowed Mr. Murdeshwar to argue his case as regards the application of both the Acts including S. 70 of the later Act. Rr. 28 and 33 made under S. 43 of Act 2 of 1912 are substantially in the same terms as Ss. 54 and 57 respectively of Bombay Act 7 of 1925. I take the argument as regards the actual awards first. S. 57, Bombay Act 7 of 1925, is as follows:

> An order passed in appeal under S. 56 shall be final and conclusive. The award of the arbitrators or a decision by the Registrar or his nominee under S. 54 shall not be liable to be called in question in any civil or revenue Court.

Under S. 54, if any dispute touching the business of a society arises between members or past members of the society or persons claiming through a member or past member or between members or past members or persons so claiming and any officer, agent, or servants of the society or between the society or its committee, and any officer, agent, member or servant of the society, it has to be referred to the Registrar for decision by himself or his nominee, or if either of the parties so desires, to arbitration of three arbitrators. In this case it seems the Registrar's nominee decided the dispute in both the cases. The terms of S. 57 of the Act, which corresponds to R. 43 under the old Act, prima facie show that the award of the arbitrators or a decision by the Registrar or his nominee cannot be called in question in any civil Court. This has been held in two cases of this Court: 28 Bom L R 598[1] and 36 Bom L R 1245[2]. In the first case, which was in respect of an award made under India Act 2 of 1912, Macleod, C. J., remarked (p. 600):

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1. Bharmakka v. Mollappa, A I R 1926 Bom 352 =96 I C 350=28 Bom L R 598.
2. Cooverjee Plumber v. Vasant Theosophical Co-operative Housing Society Ltd., A I R 1935 Bom 91=154 I C 583=36 Bom L R 1245.

Once it is conceded that where a dispute lies between a Co-operative Society and a member who is dead, proceedings can be continued or entertained between the Society and the legal representatives of the deceased debtor, the arbitrators would be competent to decide who were the legal representatives of the deceased debtor and would have jurisdiction to decide that question, even though they might come to a wrong conclusion.

Similarly, in our opinion, when a question may arise as to whether there has been undue influence or fraud in any transaction involved in the reference to the Registrar under the Act, that would be a question for the arbitrator to decide and would not therefore be a matter into which a civil Court would be competent to inquire. In the second case, viz., 36 Bom L R 1245,[2] it was held that a suit to set aside an award of arbitrators or a decision by the Registrar or his nominee arrived at under the provisions of the Bombay Co-operative Societies Act, 1925 cannot be entertained by a civil Court under S. 9, Civil P. C., read with S. 57 of the Act. Mr. Jahagirdar has however contended in the first place, that the award, Ex. 91, cannot be regarded as a proper award under the Act, because though as a matter of fact the plaintiffs might be the heirs of Shitabai, they were sued before the Registrar not as such heirs but as sureties to the mortgage loan. In Ex. 85 the plaintiffs have stood sureties for the mortgage loan and Ramabai, their mother, has affixed her thumb impression "for herself and for her minor sons". The award, Ex. 91, shows that not only the plaintiffs but Ramabai herself were made defendants and the award makes all of them personally liable. The plaintiffs have not been shown therein as Shitabai's heirs. Mr. Jahagirdar therefore has argued that the plaintiffs must have been sued as sureties and not as heirs of Shitabai. It is not denied, though the issue on this point does not appear to have been pressed in the lower Court, that the plaintiffs were not at any time members of the defendant society. Mr. Jahagirdar has contended that the Registrar ought not, therefore, to have entertained the dispute in the form in which it came before him. He has invited our attention to 55 Mad 298[3] and has argued that where an arbitrator has entertained a dispute when he was not competent to do so, he must be held to have acted beyond his jurisdiction, and a civil Court would have the authority to set aside the award passed in such circumstances.

It appears to us difficult to accept this view. The other award has not been produced, nor the arbitration papers underlying Ex. 91, and it seems to us not easy to ascertain how in the arbitrator's Court the plaintiffs were actually treated. The point again has been raised by Mr. Jahagirdar in this Court for the first time and the case relied on by him has no reference to the provisions of the Co-operative Societies Act. It seems to us that in enacting S. 57, Co-operative Societies Act, the Legislature clearly intended that where an arbitrator has passed an award under this Act, it will not be open to a civil Court to go behind that award and to call in question any matter which might have arisen in connexion with the decision of the dispute which necessitated that award. There is no doubt that the Act curtails the ordinary right of a person to go to a civil Court, and that it should therefore be strictly construed ; and there also appear to be some probabilities in favour of Mr. Jahagirdar's contention. But there is equally no doubt that the plaintiffs are, as a matter of fact, Shitabai's heirs and that the dispute between them and the defendant society was, as a matter of fact, entertainable by the Registrar under the Act. We do not therefore see sufficient reason for holding that either of the two awards was not a proper award under the appropriate Act.

Mr. Jahagirdar has urged a second reason in this connexion, viz., that fraud was committed on the Court of the arbitrator and this constitutes a ground for setting aside the awards. The fraud alleged is that the minor plaintiffs were treated as majors and that Ramabai herself was sought to be made and actually made liable. In this connexion Mr. Jahagirdar has drawn our attention to two rulings of the Allahabad High Court, viz., 25 All 19[4] and 41 All 182.[5] Again this is a new point which had not been urged at any earlier stage. It does not also seem to us very clear that in this respect the defendant Bank did anything which might be construed as fraud on the arbitrators. Nor has Mr. Jahagirdar been able to refer to any decision of any other High Court in this connexion; and we think it unnecessary to consider the applicability of the legal principle in question to the facts of the case. As regards the portion of the loan not covered by the two awards, S. 54 of Bombay Act 7 of 1925 and the corresponding rules under the old Act appear to apply. That section runs thus:

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[3] Tulsiram v. Chairman, Municipal Council Madura, A I R 1932 Mad 90=135 I C 452=55 Mad 298=62 M L J 77.

[4] Mahadeo Prasad v. Takia Bibi, (1902) 25 All 19=1902 A W N 182.

[5] Raghunandan Ahir v. Sheonandan Ahir, A I R 1919 All 170=49 I C 306=17 A L J 97=41 All 182.

> If any dispute touching the business of a society arises between members or past members of the society or persons claiming through a member or past member or between members or past members or persons so claiming and any officer, agent, or servant of the society, or between the society or its committee, and any officer, agent, member or servant of the society, it shall be referred to the Registrar for decision by himself or his nominee, or if either of the parties so desires, to arbitration of three arbitrators, who shall be the Registrar or his nominee and two persons of whom one shall be nominated by each of the parties concerned. A dispute shall include claims by a society for debts or demands due to it from a member or past member or the heirs or assets of a past member whether such debts or demands be admitted or not.

There can be no question that this part of the loan gave rise to a dispute between the defendant society and the deceased Shitabai who admittedly was a member of the society. Mr. Jahagirdar has argued that the first part of this section should not be held to exclude the jurisdiction of a civil Court. We cannot agree with this view, as the wording of the section makes it clear that all disputes of the nature described must be referred to the Registrar or to arbitration as stated therein. The jurisdiction of the civil Courts in such disputes must, in view of S. 9, Civil P. C., be held to be impliedly barred. Mr. Jahagirdar's next main argument is that the terms of the second paragraph of this section show that disputes which are excluded from the jurisdiction of the civil Courts must be disputes wherein claims are made by a society for debts or demands due to it from a member or past member or the heirs or assets of a past member. This construction again does not appear to us to be correct, as this second paragraph appears to have been inserted in the section merely with the object of making it clear that the claim by a society for debts or demands, whether such debts or demands be admitted or not, ought to be regarded, for the purpose of this section, as a "dispute". The word "include" shows that this paragraph is not meant to be an exhaustive definition of a dispute. We, therefore, hold that the awards made in the Court of the arbitrators are not liable to be called in question in a civil Court and that as regards the rest of the mortgage loan also the jurisdiction of the civil Court is barred.

We now come to Mr. Murdeshwar's argument based on S. 70 of the Bombay Co-operative Societies Act. This section runs as follows:

> No suit shall be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after-notice in writing has been delivered to the Registrar, or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

The wording of this section follows that of S. 80, Civil P. C. It is not denied that in this case no notice in writing was delivered to the Registrar or left at his office before the present suit was instituted. Mr. Jahagirdar has argued that this section has been enacted for the benefit of the societies themselves and that it is capable of being waived, and he contends that in the present case the requirements of this section were as a matter of fact waived by the defendant society. He has referred us to 34 Cal 257[6] which was a case under Bengal Act 9 of 1880, and as the Secretary of State was a party, the question of notice under S. 424 (corresponding to the present S. 80, Civil P. C). arose in that case. Therein Mr. Mookerjee, J., said (p. 282):

> A notice under S. 424, Civil P. C., is given for the benefit of the defendant, and it may be presumed that the intention of the Legislature was that the Secretary of State should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thought fit, before he was impleaded in the suit. There is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial. This is amply borne out by the cases in 14 M & W 199,[7] 11 C B 588[8] and (1854) 9 Ex 404.[9] Under the circumstances disclosed in the case before us, it appears to me that the right to a notice of action was waived. It has further to be observed that, if the objection had been taken, as it ought to have been taken, when the application for

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6. Manindra Chandra Nandi v. Secretary of State, (1907) 34 Cal 257=5 C L J 148.
7. Davey v. Warne, 1845) 14 M & W 199=15 L J Ex 253.
8. Edwards v. Great Western Railway Co., (1851) 11 C B 588=11 L J C P 72.
9. Arnold v. Hamel, (1854) 9 Ex 40 =2 C L R 499=23 L J Ex 137.

amendment of the plaint was made, it would have been open to the plaintiff to bring a separate action in respect of the claim for the refund of the income-tax after due service of notice under S. 424, Civil P. C. But not only was objection not taken on the ground of want of notice but when leave was granted to amend the plaint, it was actually taken at a time when, if the objection was allowed to prevail and the plaintiff was driven to institute a separate suit for the recovery of the income-tax, he would be successfully met with the plea of limitation.

Mr. Jahagirdar contends that the same arguments would apply in the present case in which the objection based on S. 70, Bombay Co-operative Societies Act, was not taken until Mr. Murdeshwar began to argue the present appeal. He has further pointed out that in the subsequent rulings which lay down that the provisions of S. 80, Civil P. C., are mandatory the argument of Mookerjee, J. in this case does not appear to have been considersd. In 54 I A 338[10] their Lordships of the Privy Council held as follows (p. 357):

> Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions
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> ……
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> To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while S. 80 is mere procedure, is fallacious, for S. 80 imposes a statutory and unqualified obligation upon the Court.

No notice as required under S. 80 had been given in that case, and their Lordships held that the appellants had commenced their suits before the law had allowed them to sue and that therefore they were entitled to no relief. Though in this case the arguments relied upon in 34 Cal 257,[6] were not noticed or discussed, it seems to us that this case clearly concludes the matter, and that when the requisite notice under S. 80 of the Code has not been given before the institution of this suit, it must be held that such an omission prevents the Court from taking cognizance of the dispute involved. This was affirmed in a later Calcutta case, 58 Cal 850.[11] In this case it was held:

> Section 80 is express, explicit and mandatory, and it admits of no implications as to the notice; we think it was the duty of the Court to look into the plaint and when, on the face of it, there was no averment as to service of the notice the Court should have held that the suit was one which could not be instituted, and should reject the plaint, instead of going on with the suit.

This case, it may be observed, makes no reference to the earlier decision in 34 Cal 257.[6] Even if that earlier decision were applicable in the present case, it is to be observed that there has been no waiver of the notice by the Registrar; and it cannot, in our opinion, be argued that because the defendant did not raise any objection on the ground of want of notice, it can be said that the Registrar in effect has waived the requisite notice. The facts of the present case are not thus on all fours with those in 34 Cal 257.[6] In our opinion, the clear decision in *Bhagchand's case*[10] leaves no room for the waiver of the requisite notice in this case, and it must be held that the mandatory requirements of S. 70, Bombay Co-operative Societies Act, have not been observed. In 37 Bom L R 68,[12] also it was held that the terms of S. 70, Bombay Co-operative Societies Act, are mandatory, and we see no reason to take any other view.

The result, therefore, is that both under Ss. 54 and 57, Bombay Co-operative Societies Act, and the corresponding provisions of the earlier Act, and also under S. 70 of the Act of 1925, the lower Court was precluded from considering the merits of the present suit. That being so, it is not necessary for us to go into the merits of this case which were really a subject matter for the arbitrators to decide upon. We may however, make one or two observations as to the general facts of this case. In the first place, we find that the learned arbitrators have passed decrees against the plaintiffs personally; and as two of them, besides, were minors, those decrees appear to us to be open to objection on more grounds than one. As regards the alleged fraudulent nature of the mortgage transaction and the part that the defendant society has taken therein, we do not feel ourselves called upon to make any remarks except that the defendant society appears to have gone behind the composition scheme sanctioned by the Court: Ex. 94 shows that the amount originally due to them which included future and penal interest was fully satisfied, and it seems that the Bank has throughout treated the loan of Rs. 8,800 as taken by Govindrao himself. Mr. Murdeshwar has admitted that Govindrao took the initiative in getting this loan from the defendant Bank. As we understand that the plaintiffs have filed appeals to the Registrar of the Co-operative Societies against the awards of the arbitrators, these of course will be matters for the Registrar to consider and decide upon. We accordingly, hold that the plaintiffs' claim must fail and the suit is accordingly dismissed. We allow Appeal No. 109 and dismiss Appeal No. 110. As regards costs there is little doubt that if the defendant society had relied on S. 70, Bombay Co-operative Societies Act in the lower Court, that would have clarified the issues and in all probability stopped the litigation from coming to this Court. In view of that, we allow the defendant half his costs in both the Courts, the plaintiffs bearing their own costs throughout.

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[10] Bhagchand Dagdusa v. Secretary of State, A I R 1927 P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).

[11] Jagadischandra Deo v. Debendraprasad Bagchi, A I R 1931 Cal 503=132 I C 634=58 Cal 850=35 C W N 161.

[12] Maruti v. Namdev Co-operative Society, AIR 1935 Bom 123=154 I C 735=37 Bom L R 68.

N. J. Wadia, J.—In my opinion the plaintiffs' suit must be dismissed under S. 70, Bombay Co-operative Societies Act 7 of 1925. That section provides that:

> No suit shall be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after notice in writing has been delivered to the Registrar, or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

It is admitted that no notice had been given with regard to the present suit. The provisions of S. 70 are similar to those of S. 80, Civil P. C. The section is mandatory, and the consequence of the plaintiffs' failure to give notice is as if their action had never been brought. As was held in 54 I A 338[10] (p. 358):

> It was unsustainable *in limine*. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise.

It was contended, however, that as the defendant Bank had not raised this objection in the trial Court or even in the memorandum of appeal but had raised it only in the course of the arguments, it must be taken to have waived the objection and should not be allowed to raise it at this late stage, when any fresh suit by the plaintiffs would be barred by limitation. Reliance has been placed on the ruling in 34 Cal 257.[6] It was held in that case that (p. 282):

> A notice under S. 424, Civil P. C., is given for the benefit of the defendant, and it may be presumed that the intention of the Legislature was that the Secretary of State should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thought fit, before he was impleaded in the suit. There is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial.

The objection in that case was taken at a time when, if it had been allowed to prevail and the plaintiff had been driven to institute a separate suit for the recovery of the income-tax, he would have been successfully met with the plea of limitation. It was held that (p. 282):

> It is well settled that, if provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of the waiver. . . . .

That was a ruling under S. 424, Civil P. C., corresponding to the present S. 80, under which a notice to the Secretary of State is necessary before he can be sued. The principle laid down was that the provisions of the section were meant for the benefit of the defendant and he could waive them or could be held by his conduct to have waived them. A notice under S. 70, Bombay Co-operative Societies Act, has to be served not on the defendant Society but on a third party, the Registrar, and it cannot be held that the conduct of the defendant in not raising the objection at the proper time could deprive the Registrar of a right which the law gives him. The section requires the fact of notice to be mentioned in the plaint and it is the duty of the Court to see that the mandatory provisions of the section are complied with. There has been no waiver of notice in this case by the Registrar. The contention of the appellant Bank (defendant) in Appeal No. 109 of 1931 must therefore prevail and that appeal must be allowed and the plaintiffs' suit dismissed.

It is clear that the plaintiffs' suit was also barred under Ss. 54 and 57, Co-operative Societies Act. The plaint did not allege that the defendant had practised any fraud on the arbitrators, and the plaintiff cannot now be allowed in appeal to allege such a fraud. The rulings, 25 All 19[4] and 41 All 182,[5] which were cited on behalf of the plaintiffs, would not therefore help them. It was argued that Ss. 54 and 57 cannot apply when the arbitrators have acted *ultra vires*, and it was contended that in this case the arbitrators had no jurisdiction because the plaintiffs were parties to the proceedings not as heirs of Shitabai but as sureties, and no guardian for the minor plaintiffs was appointed in the arbitration proceedings. The award does not state clearly whether the plaintiffs were made parties as heirs of Shitabai and whether Ramabai, the mother of the plaintiffs, who was a party to the proceedings, was a party in her own right or as guardian of the minor plaintiffs. The question is one of mixed fact and law. If this objection had been taken in the trial Court, the defendant Bank might have been in a position to prove from the record of the arbitration proceedings that the plaintiffs had been made parties as heirs of Shitabai. It is not disputed that if they had been joined as heirs the arbitrators had jurisdiction under S. 54. The learned trial Judge says in his judgment :

> At the date of these proceedings Shitabai was dead and hence the present plaintiffs were made parties to the proceedings as heirs and representatives of the said Shitabai, because Shitabai has left a will bequeathing all her estate including the plaint property to the present plaintiffs.

An issue was framed (issue 6) "were plaintiffs members of the society", and in para. 22 of the judgment the learned Judge says :

> This issue is not pressed because, under S. 54, Bombay Co-operative Societies Act a dispute referred to therein includes a claim by the society for debts or demands due to it from a member or the heirs or assets of the past member.

This finding shows that it was apparently conceded during the trial that the plaintiffs had been sued as heirs of Shitabai. No objection was evidently taken at that stage that though the plaintiffs were heirs they were not sued before the arbitrators as such. The plaint itself contains an admission in para. 8 that in the proceedings before the arbitrators the minor plaintiffs were represented by their guardian Ramabai. There is therefore enough material before us to enable us to hold that the plaintiffs, who are admittedly the heirs of Shitabai, were sued before the arbitrators as such. The arbitrators were, therefore, acting within their powers, and under Ss. 54 and 57 their awards could not be questioned in a civil Court. I agree, threfore, with the orders made by my learned brother.

V.B.B./A.L. *Order accordingly.*

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* A. I. R 1937 Bombay 238

RANGNEKAR, J.

Gurushiddappa Gurubasappa Bhusanur and *others* — Plaintiffs — Appellants.

v.

Gurushiddappa Chenavirappa Chetni, and *others*, Defendants — Respondents.

Second Appeal No. 422 of 1934, Decided on 9th October 1936, against decision of Dist. Judge, Dharwar, in Appeal No. 51 of 1933.

(a) Representative Suit — Principle underlying explained—Expln. 6 of S. 11 and R. 8 of O. 1, Civil P. C., are based on this principle.

The principle admitted in all Courts upon questions affecting the suitor's person and liberty and his property is that the rights of no man shall be decided in a Court of justice unless he himself is present. Therefore, all persons having an interest in the object of the suit ought to be made parties, and the test is the interest the person sued or suing has in the specific relief prayed; but this general rule has an exception. It is that the Courts, to avoid inconvenience and to do justice once for all, allow one or more persons to represent others though absent, and that is why the principle of representation is adopted. Persons may be joined in a suit either on account of something personal as for instance having either sold or bought goods, or like officers of corporation as possessing certain knowledge, or because they are the owners or guardians of certain interests which the suit will affect. Upon the first ground they must be joined in their own person. Upon the other grounds the proceedings can go on with equal prospect of justice if the interests concerned are effectually and virtually protected. The absent parties in such cases appear by their representative or representatives ; their interests are protected or claims enforced. The exception is adopted by the Courts to avoid inconvenience, because if all persons interested are made parties, there would be considerable delay by abatement, change of interest, etc., and justice will be hampered. There is nothing contrary to these principles in the Civil Procedure Code and Expln. 6 of S. 11 and R. 8, O. 1 are based on these principles.
[P 239 C 2 ; P 240 C 1]

*** (b) Civil P. C. (1908), S. 11, Expln. 6 ; O. 1, R. 8—Scope of S. 11, Expln. 6—Expln. 6 to S. 11 is not confined to cases covered by O. 1, R. 8, but includes any litigation in which parties are entitled to represent other interested persons.**

It is possible for a suit to be a representative suit within the meaning of Expln. 6 to S. 11, Civil P. C., although it need not come under O. 1, R. 8 and, therefore, need not be brought under the provisions of that order. Expln. 6, therefore, is not confined to cases covered by O. 1, R. 8, but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves : *2 Mad 328* and *A I R 1933 P C 183, Ref.* [P 240 C 2]

(c) Estoppel — Person in previous suit, allowing opposite party to be sued in representative capacity and getting decree in his favour—Such person in subsequent suit is estopped from contending that opposite party in previous suit was not sued in representative capacity.

Where a person in a previous suit allowed the opposite party to proceed with the suit on the footing that he was suing him (opposite party) in a representative capacity and having assumed this position took the chance of a decree in his favour, such person is estopped in a subsequent suit from contending that the opposite party in the previous suit was not sued in a representative capacity, on the principle of waiver or election or of conduct; it would be wholly inequitable to permit him to resile from the position he took in the earlier suit. [P 242 C 1]

S. V. Palekar — for Appellants.

A. G. Desai — for Respondents.

Rangnekar, J.—This is an appeal from a judgment of the District Judge of Dharwar, affirming a decree made by the Second Class Subordinate Judge at Hubli in a suit for redemption of a mortgage of certain property mentioned in the plaint. The suit was filed under the provisions of O. 1, R. 8, Civil P. C. The facts are not very clearly stated in the judgments, but it is sufficient to state that the plaintiffs are claiming through the owner of the property, and the principal contesting defendants, who are styled as the 'Hubli Pinjrapole Samstha,' are claiming as donees of the property from the representatives of the mortgagee of the property, who as a result of certain litigation had purchased the property at a Court-sale and claimed to have become owners of it. It was *inter alia* pleaded by these defendants that the suit was barred by res judicata by reason of a decree made in an earlier suit brought by the same plaintiff against them for the same relief in 1926. That suit was dismissed and the decree was confirmed in appeal. There was a second appeal to this Court, but the appeal was held to have abated. They also pleaded that the plaintiffs were estopped by their conduct from maintaining the suit. These are the only questions which have to be determined in this appeal.

The plaintiffs contend that the bar of *res judicata* does not arise, as the parties in the suit were not the same in the earlier suit or claiming under any of the parties to the earlier suit, and that the identity of the parties being different, the earlier decision is not binding on them. They say that the Pinjrapole is an unregistered association and, therefore, as the earlier suit was not brought against the members of the Pinjrapole or under the provisions of O. 1, R. 8, Civil P. C., and as the present suit is a representative suit there is no identity of parties. To this it is answered that the earlier suit also was a representative suit within the meaning of Expln. 6 of S. 11, Civil P. C., and that being the case, the bar of res judicata would apply. There is some dispute between the parties as to the exact description of the defendants in the title of the plaint in the earlier suit. Unfortunately neither side has produced the original plaint and it is not on record, but the decree in the original suit, which is available and which sets out the plaint, describes the defendants as "The Hubli Pinjrapole Samstha by its President Mahadeva Niranjanappa Sindgi" and that is also how the defendants are described in the title in the decree of the High Court in second appeal in the earlier suit. The appellants' counsel, therefore, says that the suit was brought against the Pinjrapole by its President, and as the Pinjrapole was an unregistered association the suit was not properly constituted. On the other hand, the learned counsel for the defendants says that in the earlier proceedings the President was sued as representing the Pinjrapole. The Court interpreter has translated the title of the previous suit which was in Kanarese as follows : "The Hubli Pinjrapole Samstha of this the President Mahadeva Niranjanappa Sindgi". This, in my opinion, means the defendant in the suit was the President and not the institute, and the only question would be whether he was sued in a representative character and as representing the Pinjrapole and all its members.

The principle admitted in all Courts upon questions affecting the suitor's person and liberty and his property is that the rights of no man shall be decided in a Court of justice unless he himself is present. Therefore, all persons having an interest in the object of the suit ought to be made parties, and the test is the interest the person sued or suing has in the specific relief prayed. But this general rule has an exception. It is that the Courts to avoid inconvenience and to do justice once for all allow one or more persons to represent others though absent and that is why the principle of representation is adopted. Persons may be joined in a suit either on account of something personal, as for instance having either sold or bought goods, or like officers of corporation as possessing certain knowledge, or because they are the owners or guardians of certain interests which the suit will affect. Upon the first ground they must be joined in their own person. Upon the other grounds the proceedings can go with equal prospect of justice if the interests concerned are effectually and virtually protected. The absent parties in such cases appear by their representative or representatives; their interests are protected or claims enforced. A familiar instance is that of an executor or administrator. The rule, however, is, as observed by Sir John Leach in 5 Madd 4[1] at p. 13:

> Where it is attempted to proceed against two or three individuals, as representing a numerous class, it must be alleged that the suit is brought against them in that character. . . .

Story on Equity Pleadings put the case with regard to the latter class of cases in this way (pp. 118-19):

> The second class of cases, constituting an exception to the general rule, and already alluded to, is, where the parties form a voluntary association for public or private purposes, and those who sue or defend, may fairly be presumed to represent the rights and interests of the whole.

This exception is adopted by the Courts to avoid inconvenience, because if all persons interested are made parties, there would be considerable delay by abatement, change of interest, etc., and justice will be hampered. Is there, then, anything contrary to these principles in the Civil Procedure Code. I think not. Expln. 6 of S. 11, Civil P. C. is in these terms;

> Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The other rule, which allows a representative suit being brought against one or two persons or more persons as representing a larger body of persons is contained in O. 1, R. 8, Civil P. C.

> Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement as the Court in each case may direct.

In my opinion, these two rules are based upon the principles which I have set forth above. But it is argued on behalf of the appellants that O. 1, R. 8, controls Expln. 6 of S. 11, and, therefore, the only way in which the Pinjrapole could have been sued in the earlier suit was under O. 1, R. 8, and admittedly that was not done. In the first place, there was no evidence before the Court in the earlier suit—there is none on the record before me—to show how many members the Pinjrapole had in 1926. Secondly, O. 1, R. 8 is exhaustive of what it says, and it is clear from it that it is only when the parties are numerous that a suit can be brought under the provisions of O. 1, R. 8. That it is possible for a suit to be a representative suit within the meaning of Expln. 6, although it need not come under O. 1, R. 8, and, therefore, need not be brought under the provisions of that order has been held from very earliest times in this country, and I need only refer to one old case in 2 Mad 328,[2] where it was held that Expln. 5 of S. 13 of the old Code, corresponding to Expln. 6 of S. 11, Civil P. C., 1908, was not limited to the case of a suit under S. 30, which now corresponds to O. 1, R. 8, of the present Civil Procedure Code. Expln. 6, therefore, is not confined to cases covered by O. 1, R. 8, but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. But Mr. Palekar relies on 60 I A 278,[3] where it was held that, in a representative suit instituted under O. 1, R. 8, Civil P. C., 1908, the decision in a former suit does not operate as res judicata by force of S. 11, Expln. 6, unless the former suit was instituted in compliance with the above rule (formerly S. 30 of the Code of 1877), namely by permission of the Court, the Court giving notice as therein prescribed to all persons interested. If the suit is one under O. 1, R. 8, that is to say, if parties are numerous, then, of course, the provisions of that rule must be strictly complied with, otherwise Expln. 6 of S. 11 will not apply even though the omission

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1. Lanchester v. Thompson, (1820) 5 Madd 4=56 E R 795.
2. Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi, (1880) 2 Mad 328.
3. Kumaravelu Chettiar v. Ramaswami Ayyar, A I R 1933 P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

is due to inadvertence and has caused no injury. But Expln. 6 is not confined to suits under O. 1, R. 8, but extends to any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves; and that is clear from the observations of their Lordships at p. 294. This is what their Lordships say:

> And the result of the decisions has shown that the explanation is not confined to cases covered by the rule, but extends to include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves.

But it is argued that in the passage, which I have quoted, the Privy Council observed that in such cases parties ought to be entitled to represent others, and if a person is not entitled to represent others, he cannot sue or be sued in a representative capacity. This, of course, is a correct proposition. But it is difficult to see how it applies to the facts of this case. In this case, in the earlier suit, it was *inter alia* pleaded that the suit as framed was not maintainable. It is true that in their written statement the defendants did not specify clearly the grounds on which the contention was based, but it was open to the plaintiffs by an application to compel them to set out the grounds on which this plea was based. The plaintiffs however took no steps in the matter. Fourteen issues were raised in the case, including the issue that the suit was not maintainable. The Court went into the merits of the case and recorded findings on the first six or seven of them. No finding was recorded on this particular issue as to the maintainability of the suit, and it seems to me to be pretty clear that this, along with some other issues, was abandoned by the parties. Therefore, the position is that the issue as to the constitution of the suit against the President as representing the Pinjrapole was specifically raised and given up. The abandonment of the issue must mean that in any case the defendant conceded and admitted that he was sued in a representative capacity and as representing the Pinjrapole. The plaintiff acquiesced in this and elected to proceed with the suit on the footing that the President was sued in a representative character. Both the parties therefore proceeded upon the footing that it was a representative suit. The suit was conducted bona fide; the Court was satisfied that the other parties, who might have been joined, wished the Court to decide in the presence of one party, that is the President. The plaintiff took the chance of getting a decree in his favour as did the Pinjrapole, and the litigation went on in three Courts on that footing. It is conceded that the question that the Pinjrapole was not sued properly, or that the President did not represent it, or that the suit was not well constituted, was never raised in the three Courts; and on these facts it is difficult to see why it cannot be held that the President was entitled to represent the Pinjrapole, or that the suit was in a representative character.

Mr. Desai has very properly drawn my attention to the evidence, which shows that so far as the Pinjrapole is concerned, the litigation was adopted by the institution, and that the costs of the litigation were defrayed out of the funds of the institution. It is no answer to say that the plaintiff was ignorant of the constitution of the Pinjrapole. It was his suit, and it was his duty to see that proper parties were before the Court; otherwise even if he succeeded, and the suit in fact was not a representative suit, the decree would not bar the rights of the other members of the Pinjrapole. Apart from this, the objection raised can hardly come out of the mouth of the plaintiffs. It is true that in the case of an unregistered association the ordinary rule is to sue the members individually, but I am unable to see why some of the members, or a few of the members, cannot sue or be sued for themselves and on behalf of the other members. If the members are numerous, then, of course, the procedure laid down in O. 1, R. 8 must be followed. But whether persons interested are numerous or not is a question of fact, and, as I have pointed out, in this case there is no evidence on this point. Why cannot then the plaintiffs sue two or three or even one member as representing the others, provided this position is made perfectly clear in the pleadings? The whole question is, whether the Pinjrapole was represented and sued in a representative capacity, and if two or three can represent, say, twelve people, I am unable to see why on principle one cannot sue or be sued if the fact is made sufficiently clear. If that is so, and the other conditions in Expln. 6 are satisfied, as they admittedly are in this case, it is difficult to see why Expln. 6 is not applicable, and why a decree in such a litigation cannot bind not only the plaintiff but those persons who are absent but are held by the Court to be represented by the person or persons on record. Admittedly there was no cause of action in this case against the President, except as representing the Pinjrapole. He raised the defence that the suit was not maintainable, and that defence was subsequently abandoned by him. I may now refer to an English case, 31 T L R 299,[4] where it was held that, where an unincorporated charity is sued, the proper practice is to sue a responsible official like the treasurer or secretary on behalf of the charity. In that case an objection was raised that the charity which was the National Church League, had been sued by name, and counsel suggested that this practice was not correct in the case of an unincorporated charity. Eve, J. intimated that where unincorporated charities were sued, the proper practice was to sue a responsible official, like the treasurer or secretary, on behalf of the charity. In this connection I may also refer to the remarks of Lord Macnaghten in (1901) A C 1,[5] which are in these words (p. 8):

> Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

Upon the whole therefore I have come to the conclusion that the lower Courts were right in holding that the suit was barred by *res judicata*. But I think there is another answer to the plaintiff's contention, and that is estoppel. In my opinion, having allowed the defendant to proceed with the suit on the footing that he was suing him in a representative capacity, having assumed this position and taken the chance of a decree in his favour in three Courts, clear estoppel arises against the plaintiff to prevent him from now contending in this suit that the Pinjrapole was not represented in his own earlier suit. Supposing there had been a decree against the Pinjrapole, could the Pinjrapole have disputed it in another litigation brought by them or some of the others? I think not. The obvious answer would have been that they were estopped. The principle is: *Allegans contraria non est audiendus*. "He is not to be heard who alleges things contradictory to each other." In other words, as Lord Kenyon says, a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest. Sherwood, C. J. in (1892) 110 Missouri 173[6] observed as follows:

> Having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, she cannot, after being cast in the suit, now change front, and insist that error occurred in making her a party defendant. Courts of justice cannot be trifled with in this way. Parties litigant are not allowed to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt.

The plaintiff must be taken to have represented to the Court in the earlier suit that the President was sued in a representative capacity, that the suit was well constituted, and invited or allowed the Court to try the suit in a wrong way, and now he wants to go back upon it. He must be taken in the earlier suit to have insisted upon the President being sued in a representative capacity. In my opinion, there can be no stronger case of an absolute waiver or election or of conduct rendering it wholly inequitable to permit him now to resile from the position he then adopted. In the result, therefore, the appeal must be dismissed with costs.

B.D./D.S. *Appeal dismissed.*

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[4] *In re* Pritt; Morton v. National Church League, (1915) 31 T L R 299=113 L T 136.

[5] Bedford (Duke of) v. Ellis, (1901) A C 1=70 L J Ch 102=83 L T 686=17 T L R 139.

[6] Bensieck v. Cook, (1892) 110 Missouri 173.

A. I. R. 1937 Bombay 242

BEAUMONT, C. J.

Ezra Sion & Co. — Applicant.

v.

Kailas Viraiah — Opposite Party.

Civil Revn. No. 50 of 1936, Decided on 12th November 1936, against decision in Civil Suit No. 23578 of 1934.

Limitation Act (1908), S. 13—Extension of period—Plaintiff must prove that defendant was absent from British India and from

territories beyond British India under administration of Government—Secunderabad is under administration of Government of India.

A person who seeks to take advantage of the extension of time allowed under S. 13, Lim. Act, must bring himself within the terms of the section. The burden is upon him to prove both that the defendant has been absent from British India, and from territories under the administration of the Government of India. Secunderabad is under the administration of the Government of India: *A I R 1933 P C 134, Rel. on.* [P 243 C 1, 2]

V. B. Virkar — for Applicant.

N. C. N. Acharya—for Opposite Party.

Order.—This is an application in revision under S. 115, Civil P. C. The plaintiff sued in the Small Cause Court, Bombay, for the balance of the price of goods sold and delivered. The goods were sold and delivered on 16th June 1929, and the suit was filed in September 1934, so that *prima facie* it is out of time. The plaintiff sought to bring the case within S. 13, Lim. Act. The trial Court held that the suit was barred, and the case did not come within S. 13, and on appeal to the full Court, the full Court agreed with the decision of the trial Judge. It is not disputed that between the date of the promissory note and the filing of the suit the defendant was living in Secunderabad, which is a British Cantonment. S. 13, Lim. Act, provides that in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India and from the territories beyond British India under the administration of the Government shall be excluded. It seems to me clear that the plaintiff, who seeks to take advantage of the extension of time allowed under S. 13, must bring himself within the terms of the section. That is to say, the burden is upon him to prove both that the defendant has been absent from British India, and from territories under the administration of the Government of India. That was the view taken by the learned trial Judge, but the full Court seem to have thought that if the plaintiff established that the defendant was absent from British India, the burden was upon the defendant to show that the place where he was, was under the administration of the Government. The burden, in my view, is clearly upon the plaintiff, and the only question is whether the plaintiff has established that the Cantonment of Secunderabad, which is admittedly territory beyond British India, is under the administration of the Government, which must mean the Government of India, so that the defendant has been absent from territories under the administration of the Government of India. There is a recent decision of the Privy Council, 60 I A 167,[1] in which the status of Secunderabad is discussed. According to the facts, which the reporter says are stated in the judgment of the Judicial Committee, Secunderabad was fixed for a British Cantonment pursuant to Art. 4 of a treaty of 1798 between the Nizam and the East India Company. Civil jurisdiction is exercised in the administered areas of the Hyderabad State, including the Cantonment of Secunderabad, under an order of the Governor-General in Council made on 21st December 1925, under the Indian (Foreign Jurisdiction) Order in Council, 1902. The order of 1925 superseded earlier orders. In the judgment of the Privy Council their Lordships say this (p. 171):

> It is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court, and referred to in the judgment, in 21 Cal 177.[2] That reply makes it clear that the British Cantonment in Secunderabad still remains part of Hyderabad State and the property of the Nizam. The administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

Mr. Virkar for the plaintiff relies strongly on that passage from the Privy Council's judgment, particularly where holding that the order of the District Court of Secunderabad is the order of a foreign Court in relation to the Courts of British India. That seems to me however to be quite a different question from whether Secunderabad is under the administration of the Government of India. It seems to me from the statement of fact which I have read that the Privy Council adopt the view that it is. At any rate I am clearly of opinion that the plaintiff has not succeeded in establishing that it is not. That being so, in my opinion the judgments of the lower Courts are right, and the plaintiff's suit is out of time. The application must be dismissed with costs.

B.D./D.S. *Application dismissed.*

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[1] Anantapadmanabhaswami v. Official Receiver, Secunderabad, A I R 1933 P C 134=142 I C 552=56 Mad 405=60 I A 167 (P C).

[2] Husain Ali Mirza v. Abid Ali Mirza, (1894) 21 Cal 177.

A. I. R. 1937 Bombay 244

RANGNEKAR, AG. C. J. AND
TYABJI, J.

Achut Sitaram Patwardhan — Appellant.

v.

Shivajirao Krishnarao Gaikwad and *others* — Respondents.

First Appeal No. 93 of 1930, Decided on 24th July 1936, from decision of First Class Sub-Judge, Poona, in C. S. No. 1072 of 1924.

(a) Civil P. C. (1908), O. 40, R. 1 — Object of—Court is empowered to authorize receiver to bring suit in his own name — Grounds upon which suit is based are immaterial — Powers of receiver are co-extensive with those of owner for purpose of bringing suit.

The wording of O. 40, R. 1, Civil P. C., is wide enough to empower the Court to authorize a receiver to bring any suit in his own name, the object of which is to preserve, collect or realize the property in suit, and where the receiver is authorized in this behalf, he may sue in his own name. The grounds upon which the suit is based are immaterial. If the owner can bring a suit to recover his own property and has a cause of action to do so, it is difficult to see why the receiver, who has the same powers as the owner has to bring a suit and who is authorized by the Court in that behalf, cannot bring such a suit. The receiver appointed, when properly authorized, would have the same powers as the owner as regards the property ; and if the owner could not have sued for possession of the property, the receiver could not. But if the owner could bring a suit and has a cause of action, then the receiver would be entitled to sue on that cause of action, subject of course to his being authorized by the Court in that behalf. He is appointed for the benefit of all the parties concerned in the litigation and is the representative of the Court and the parties interested in the litigation : *35 Mad 578, Ref.* [P 250 C 2 ; P 251 C 1]

(b) Transfer of Property Act (1882), S. 52 — Object of — Notice — Sale pendente lite— Doctrine of lis pendens is not based upon notice but upon expediency — Notice of suit to purchaser pendente lite is immaterial to bind him with doctrine of lis pendens—Right conferred by section being statutory and restrictive of ordinary rights of parties Section must be construed strictly — Misdescription of land in pleadings prevents operation of doctrine of lis pendens—Parties able to identify property in suit in spite of misdescription—Doctrine applies.

The wording of S. 52, T. P. Act, makes it clear that the doctrine of *lis pendens* is not based upon notice, but it rests upon the ground that neither party to a suit can alienate the property in suit pending the suit so as to defeat the rights of the other party. It is based upon expediency, and it is immaterial whether the alienee *pendente lite* had or had not notice of the suit. The mere pendency of a suit will not prevent one of the parties from selling the property, the subject matter of the suit, but the purchase will in no manner affect the right of the other party under any decree which may be made in the suit, unless the property was sold with the permission of the Court. A purchase made of land actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice affects the purchaser in the same manner as if he had notice, and he will accordingly be so far bound by the judgment or decree as not to be entitled to defeat the main object of the suit. Ordinarily the judgment of a Court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of an action is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired and such purchaser need not be made a party to the action. The right being created by a statute and being restrictive of the ordinary rights of parties, the section must be construed strictly. This statutory right is given to the party to the suit other than an alienating party to have an alienation set aside so far as it is necessary for the protection of his own rights. The rules of procedure require that when any immoveable property is in question in a suit, it must be as far as possible specifically described in the plaint and, if possible, by its boundaries. A misdescription of the land in the pleadings will prevent the operation of the doctrine of *lis pendens* ; but if in spite of the misdescription the land is sufficiently identified, then the doctrine will apply. [P 251 C 1, 2 ; P 252 C 2 ; P 253 C 2]

A *lis pendens* will generally be created whether the property involved in suit is described, either by such definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character or status, and by such reference that upon inquiry identity of the property involved in litigation can be ascertained : *Bellamy* v. *Sabine, (1857) 1 De G & J 566, Rel. on* ; *A I R 1919 Cal 40* ; *A I R 1920 Nag 92* and *A I R 1919 All 320, Ref.*
[P 253 C 1]

(c) Limitation Act (1908) — Articles — Applicability — In determining which article is applicable regard must be had to nature of suit and relief claimed — It is plaintiff's right to bring his suit within any article of limitation — Question of limitation is to be decided with reference to cause of action and to frame of suit when instituted and not with what is found at the end of trial.

In order to decide which article of the Limitation Act applies to a suit, and whether the suit is barred or not, regard must be had to the nature of the suit and the relief claimed. It is the right of the plaintiff to frame his suit so as to bring it under any article of the Limitation Act which is more favourable to him as giving a longer period than another. If he frames the suit wrongly, he takes the consequences. But so long as the frame of the suit is consistent with the cause of action as alleged, the mere fact that he had made a claim which on investigation is

found to be unauthorized or which he was not entitled to make, cannot affect the question as to what article would apply. The question of limitation is to be decided with reference to the cause of action and to the frame of the suit when instituted and not with what is found at the end of the trial or the relief which is granted.
[P 254 C 1, 2]

G. N. Thakor and *D. R. Patwardhan* —for Appellant.

D. A. Tulzapurkar, H. C. Coyajee and *B. G. Rao* — for Respondents 1 to 4.

Rangnekar, Ag. C. J.—This suit is concerned with the estate of a wealthy family in Poona called Gaikwad family. The common ancestor of the family was one Limbaji. He settled at Indore and enjoyed the favour of the ruler. He as well as other members of the family were employed in the State in various capacities and received from the ruler large gifts in the shape of jewels, cash and other property as a mark of their personal favour. The family thus amassed a large fortune, which they invested in the purchase of immoveable property at Poona and Satara Districts. Limbaji died in 1892. About 1897 or 1898, the family seems to have incurred the displeasure of the ruler, in consequence of which their property at Indore was confiscated, and they had to leave the State. The family then came and settled in Poona. Limbaji had three sons—Gangaram, Gopal and Balwant. Of these, Gopal was the manager of the family. Gopal died in 1906, leaving a widow Laxmibai and a minor son Krishnarao. Gangaram had a son called Yadav; and Balwant, who died in 1893, left him surviving a son named Baburao. After the death of Gopal, his widow obtained a certificate of guardianship under Act 8 of 1890. No notices were issued to the other members of the family, nor was the whole of the family property disclosed in those proceedings. Thereafter, in 1907, she purchased in the name of her minor son Krishnarao an eight-anna share from one Rajguru family in two inam villages of the name of Chandori and Atit situate in the districts of Poona and Satara respectively.

She died in 1910. On her death Krishnarao, who had just attained majority, took charge of the entire property and began to manage it. This led to disputes between the members of the family, as a result of which in 1911, Baburao filed a suit for partition, being suit No. 733 of 1911, against Krishnarao in the Bombay High Court. Neither Gangaram nor Yadav were joined in this suit on the allegation that in 1908 Gangaram had passed a release in favour of the other co-parceners and had gone out of the family, and that in the family property Baburao and Krishnarao had an equal half share.

In September 1911, the High Court returned the plaint for want of jurisdiction. On 11th October 1911, Baburao instituted another suit for partition, being suit No. 410 of 1911, against Krishnarao in the District Court, Poona. On or about 7th October 1911, Baburao mortgaged his share in the joint family estate to one Bolton for Rs. 40,000. Krishnarao, who by that time had commenced to squander the moveable property, began to alienate immoveble property in his possession, and on 26th August 1912, he sold the two villages, or his right, title and interest in them, to one Patwardhan, the father of the defendant-appellant. On 24th September 1912, Gangaram and Yadav brought a suit for partition, being suit No. 359 of 1912, against Krishnarao and Baburao in the District Court at Poona. On 14th March 1913, Baburao sold a fraction of his share in the joint family estate to one Gazdar, and sold another fraction of his share to one Bahadurji on 1st May 1913. There was an order for further particulars as to the property in suit No. 359, and the plaint was accordingly amended. It is not necessary to refer to this order.

In 1914 Bolton brought a suit on his mortgage against Baburao; and, on 24th February 1915, he as well as Gazdar and Bahadurji were added on their application as party-defendants to suit No. 359 as defendants 3, 4 and 5 respectively. Gangaram compromised his claim with Krishnarao in suit No. 359, as the result of which he obtained an inam village and informed the Court that he did not wish to proceed with the suit. Thereupon the Court held that that suit had abated in spite of the opposition of defendants 2 to 5 and struck it out of the file in 1916. Defendants 2 to 5 appealed against that order successfully; and in 1919, the order of abatement was set aside, and it was held by this Court that the suit must proceed as regards the rights and claims of defendants 2 to 5 for partition. Thereafter the suit was restored to the file in the Poona Court.

It appears that Baburao died in June 1913, and his widow Sonubai was brought on record in his place. Krishnarao also died pending suit No. 359, and his minor son Shivajirao was made a party in his place represented by his mother as guardian in the first instance, and after her death by his maternal uncle Umedsing. It appears that after the institution of suit No. 359 Gangaram had applied for the appointment of a receiver for the entire joint family property. The application was opposed by Krishnarao and was rejected by the Court. When Bolton was joined as a party-defendant, he renewed the application which met with the same fate, but in appeal from that order Bolton himself was appointed receiver of the entire joint family property on proper security being taken from him. In 1917 Bolton obtained a decree on his mortgage in his suit. Suit No. 359 was then brought to a trial. Apparently nobody seems to have thought of the earlier suit, No. 410, at the time. It is possible, as the learned Judge points out, that as all the persons who were interested in the family property were parties to the second suit, No. 359 of 1912, it was not considered necessary to proceed with the earlier suit, No. 410 of 1911. The fact remains, however, that no order consolidating the two suits was at any time made. Suit No. 359 was decided on 19th April 1920 and a decree made.

It was held that all the properties in the suit including properties now in dispute were joint, that the members of the family who were parties to the suit were members of a joint Hindu family, and each branch had a one-third share in it, and it was directed that defendants 3, 4 and 5 should be at liberty to realize their claims in respect of the alienations made in their favour by Baburao out of the one-third share allotted to Baburao or his branch. Krishnarao's son Shivajirao was declared to be the owner of one-third share. There was an appeal from this decree to this Court, and the decree of the lower Court was confirmed in January 1923. It appears that all this time Yadav, the son of Gangaram, had remained idle, and in 1923 he brought another suit, being suit No. 734 of 1923, for a declaration that he was not bound by the compromise made by his father and for the ascertainment of his share in the joint family estate and recovery thereof by partition. He succeeded in getting a decree, which declared that he was entitled to one-twelfth share. After the decree in suit No. 359 was confirmed by the High Court, on the application of Sonubai, the widow of Baburao, suit No. 410 was taken up; and it appears that the Judge mainly relied on the decree made in suit No. 359 and awarded one-third share in the joint family estate on 18th April 1923, in her favour. In 1924, Bolton brought the present suit against Patwardhan, and it is from the decree in that suit that the present appeal is made. The object of the suit was to set aside the sale by Krishnarao in favour of the defendant's father and to recover possession of the property sold to him. It would be convenient to refer to the pleadings here in view of the contentions taken in the appeal. The title of the suit is as follows :

> Mr. C. D. Bolton, Receiver appointed in the matter of Suit No. 359 of 1912 of the Court of the First Class Subordinate Judge, Poona...*Plaintiff.*
>
> *vs.*
>
> Atchut Sitaram Patwardhan..... *Defendant.*

After setting out the description of the property sold to the defendant in para. 1 of the plaint, the plaint referred to the purchase of the property by the mother of Krishnarao as his guardian in 1907 in the name of Krishnarao who was then a minor, and alleged that the property was purchased out of the moneys belonging to the joint family. It then went on to state as follows:

> Although the said property was in the *vahivat* (management) of the said Krishnarao since then, his cousin Baburao Balwantrao Gaikwad filed a partition suit being suit No. 410 of 1911 in the Court of the First Class Subordinate Judge, Poona. In that suit the plaintiff (Baburao) has sought the relief for recovering his share in the aforesaid property stating that the said property belonged to the joint Hindu family of the plaintiff and the defendant in that suit; and the said property has been included in that suit. The present plaintiff has been appointed receiver of the property in suit in August 1915, during the pendency of the suit. During the pendency of the suit the deceased Krishnarao sold the property in suit to the father of the defendant by a sale deed dated 26th August 1912 and gave him possession of it.

After referring to the fact that suit No. 410 of 1911 was a contentious suit and pending in the Court at that time, the plaint alleged as follows:

> The suit was a contentious suit involving the property herein, and the issue of partition in res-

pect of that property was decided in that matter and as the deceased Krishnarao had entered into the said transaction, by making a false representation that the property was of his exclusive ownership with the intention of defrauding his other kinsmen and right holders having right, title and interest in the said property, and with the object of causing loss to them, it is null and void and under that transaction neither the defendant's father nor the defendant himself acquires any kind of right whatever with respect to the suit property.

Then the plaint states that under those circumstances the plaintiff was obliged to file the present suit for having a declaration that the transaction of 26th August 1912, entered into by the deceased Krishnarao with the defendant's father in respect of the property in suit was illegal and null and void, and for getting possession of the property. The main prayer is as follows:

(a) The transaction entered into by the deceased Krishnarao with Rao Bahadur Sitaram Vishwanath Patwardhan in respect of the suit property as mentioned in Cl. 2, may be declared to be illegal and null and void; and the suit property may be taken out of the possession of the defendant and given in the possession of the plaintiff.

The plaint was filed on 25th August 1924. To this plaint the defendant filed a written statement in October 1925. His answers were:

(1) That the suit was not maintainable as it was brought by the plaintiff as receiver in suit No. 359, that the plaintiff had not stated in the plaint under what right he had brought the suit, and that he could not rely upon suit No. 410;

(2) That the property belonged to Krishnarao alone, for whom it had been purchased by his mother as his guardian;

(3) That the property was not in dispute in suit No. 410;

(4) That although it was purchased during the pendency of suit No. 410, it was not null and void; and

(5) That the plaint discloses no cause of action.

On 22nd January 1926, the plaintiff applied for amendment of the plaint. The object of the amendment was to make it clear in the body of the plaint that, although the plaintiff was appointed receiver in suit No. 359, he was so appointed during the pendency of suit No. 410; and, secondly, that suit No. 410 was decided on the strength of the decision in suit No. 359. The actual amendment made in para. 2 is as follows: The words "the present plaintiff has been appointed receiver of the property in suit in August 1915, during the pendency of the suit" were struck off, and instead it was stated as follows:

During the pendency of the suit No. 359 of 1912 in the Court of the First Class Subordinate Judge, Poona, the Honourable the High Court has, in August 1915, appointed the present plaintiff to be the receiver of the joint property of the Gaikwad family (in which is included the property in the present suit) while the said suit No. 410 of 1911 was pending in the Court of the First Class Subordinate Judge, Poona.

Then a separate para. 2-A was added, which is as follows:

Suit No. 410 of 1911, in the First Class Subordinate Judge's Court, Poona, has been decided on the strength of the decision of the suit No. 359 of 1912 on the date, 18th April 1923, following the decision in suit No. 359 of 1912 and in that matter the Court has declared that the whole of the estate in dispute is of the ownership of the joint family of Gaikwad.

Then the prayer was amended by adding after the words "null and void" the following words:

On the strength of the decrees in suits Nos. 410 of 1911 and 359 of 1912 in the Court of the First Class Subordinate Judge, Poona, under S. 52, T. P. Act.

To the application for amendment the defendant put in a reply, in which he denied the facts alleged in the application and contended that the plaintiff was not entitled to bring the present suit under S. 52, and there was no *lis pendens*. He denied that the plaintiff was appointed receiver in suit No. 359 and pleaded that the decree in suit No. 410 was contrary to S. 11, Civil P. C. He further pleaded that the plaintiff was not a party to suit No. 410. The fact remains, however, that the defendant did not specifically object to the proposed amendment but only pleaded to the facts mentioned therein, and, when the application was heard, the defendant, as the order made on the plaintiff's application shows, did not object to the amendment, which was allowed by the learned Judge in March 1926.

I may here briefly dispose of one of the points raised on behalf of the appellant, and that is that the amendment was wrongly allowed. To start with the defendant did not object to the amendment, but he pleaded to the facts; and although he was allowed to put in a supplementary written statement, he did not do so, but relied on what he had stated in his reply to the application for amendment. It is said that the amendment should not have been allowed as it has deprived the appellant of a vested right, that is a right to plead limitation. In my opinion there is no substance in that argument. The amendment did not in any way introduce a new cause of action. The plaint, as originally drafted, referred to *lis pendens*, though somewhat vaguely, and by the amendment that position was made clear. On these pleadings the learned Judge raised certain issues, of which the following are material:

1. Whether the present plaintiff, appointed receiver in suit No. 359 of 1912, cannot as such file this suit ?
2. Whether the sale by one co-sharer Krishnarao Gaikwad to the deceased father of the present defendant was affected by the pendency of suit No. 410 of 1911 ?
3. If the sale was affected also by the pendency of suit No. 359 of 1912.
4. Is the suit for possession as framed not maintainable even if *lis pendens* principle applies as is urged by the defendant's pleader now ?
6. If the defendants were *bona fide* purchasers for valuable consideration and whether the purchase would not thus be affected by the principle of *lis pendens*.

The learned Judge's findings on the issues were as follows :

1. He can.
2. Yes.
3. Yes.
4. No.
6. It would be affected.

In the result he made the following decree :

> I declare that the property in suit is liable to be proceeded against in execution of the partition decree in suit No. 359 of 1912, i. e., to be divided or sold in that execution, and in case the property in suit has to be sold in execution of that decree, defendant will hand over possession to the purchaser thereof subject to such equities as may be in defendant's favour. I order defendant to pay half the costs of plaintiff and bear his own. The remaining half costs of plaintiff will come out of the estate.

With all respect to the learned Judge, it is difficult to understand the *ratio decidendi* of the decision. The learned Judge in more than one place has observed that the question of *lis pendens* did not arise in the suit and was not material. His reasoning in this respect, which is supported here, is that as Krishnarao was a member of a joint family and as the two villages were part of the joint family property, he had no authority to sell them, and that, at any rate, it was for the defendant to justify the sale on any recognized grounds under the Hindu law. This they had not done, and that being so, the plaintiff, who represented the joint family and who himself was a transferee from Baburao, was entitled to set aside the sale, and, if necessary, a slight amendment would cure the defect in the plaint. It may be stated here that as a matter of fact, no amendment, however, was asked for or made in the lower Court. Then the learned Judge's findings are, that the sale was affected by the pendency of suit No. 410 as well as by the pendency of suit No. 359, and that being so, the whole sale was null and void and should be set aside. Then, at p. 8 of his judgment, he observes as follows :

> Plaintiff in the present suit does not seek to have the defendant's transfer declared absolutely void altogether. He simply seeks for a declaration that the transfer is ineffectual against the rights arising under the partition decree. That cannot be resisted by defendant unless he sets up a title paramount to the rights under the decree which, as I said, he does not prove. So, in my opinion, the question of *lis pendens* is not really essential to the decision of this case.

It is difficult to understand these observations when the prayer, as I have pointed out above, actually asked for a declaration that the whole sale was null and void and ought to be set aside ; and then finally he makes the order which I have set out. In my opinion, these observations and the order made are not at all supported by the plaint and the prayers in it ; and, with all respect to the learned Judge, I am unable to appreciate and accept his reasoning as well as the decree which he has made.

Mr. Coyajee tried to support the decision of the learned Judge on the ground that the sale by Krishnarao was an unauthorized alienation by a member of a joint family, and that being so it would only bind the share of the alienating member as the property was joint, and it was held to be joint by the decrees made in suits Nos. 359 and 410. As to the right of the plaintiff to sue, he says, it was open to the co-parceners other than Krishnarao to bring a suit to have the sale set aside except as to Krishnarao's share in the property, and the plaintiff as a transferee from Baburao has the same right. He concedes that the plaintiff is not suing as transferee but, like the Judge, says a slight amendment would do, and applies for it. He further says that the decrees in the two suits are relevant for the purpose of showing that these two villages formed part of the joint family property of the Gaikwads. I am unable to accept the argument. In the first place, apart from the decrees, there is nothing to show that these two villages formed part of the joint family property of the Gaikwads. It is true that it was alleged in the plaint that the properties were purchased out of the joint moneys, but there is no allegation that the alienation of the property by Krishnarao was unauthorized and, therefore, not binding on the family, except a vague allegation that Krishnarao alienated the property to defraud the other co-parceners.

Now, the position in law in Bombay, at any rate, is, that if the purchaser of a part of the joint family property has obtained possession, the non-alienating co-parceners would be entitled to joint possession of the property with him, and if they sue for it, a decree for joint possession can be made. They may also sue in such a case for recovery of possession of the whole of the property sold to the purchaser; but the Court is not bound to make a decree in ejectment and generally declares that the purchaser is entitled to hold the property until partition as a tenant-in-common with the other co-parceners. If the non-alienating co-parceners do not wish to be in joint possession of the property, their remedy lies in suing for a partition. Therefore, the plaintiff as a transferee of one of the co-parceners is not entitled by himself to challenge the alienation and to sue to recover possession of the property. Assuming, however that he represents the non-alienating members, it is obvious that if he had done so, different considerations would arise, and it would be open to the defendant to set up various answers. The defendant in that case might contend that Krishnarao was the manager of the family and the sale was made for necessity.

The plaintiff had two courses open to him. The first was to challenge the alienation on the ground of the villages forming part of the joint family property and that Krishnarao had no authority to alienate them so as to bind the family. But this contention can only be given effect to if a general account is taken and the sale is not void *in toto*. If it was found that Krishnarao's share was withdrawn, then, of course, the defendant as purchaser would get nothing. Whether the sale should be set aside in its entirety or partially set aside can only be determined if a general account is taken, that is to say, in a suit for partition. The other course open to the plaintiff which he seems to have preferred was to challenge the alienation on the ground of *lis pendens*; and when that is the case, any question as to whether the property alienated was joint or not is immaterial.

Whatever doubt there may have been as regards the nature of the suit before the amendment, there can be no doubt that after the amendment the claim was rested solely on the doctrine of *lis pendens*. It is said that it was alleged by the plaintiff in the plaint that the property was held to be joint family property by the two decrees, and that this fact was not denied specifically by the defendant in his written statement and that, therefore, the burden would lie on the defendant to show that this was not the joint family property. It must, however, be remembered that by his written statement the defendant contended that the property was of the separate ownership of Krishnarao having been purchased by his guardian appointed by the Court. Now, when, a guardian of the property of a Hindu minor is appointed in proceedings taken for that purpose, then it would be inconsistent with the case that the minor was a member of a joint family,—for, in a joint family ordinarily no guardian of the property of a minor co-parcener can be appointed, so that the presumption on which Mr. Coyajee relies loses its force as there is equally a presumption in favour of the defendant. The plaintiff, therefore, had strictly to prove that the property formed part of the joint family property. The plaintiff himself went into the box but said nothing as regards the nature of the property or whether it was joint family property or not. There was no other evidence in the case on the point except the two decrees on which the plaintiff relied. The defendant admittedly was not a party to the two suits. The decrees, therefore, were not *inter partes*. Now, it is true that decrees not *inter partes* may be relevant in certain cases, but they clearly are not conclusive of the rights of the parties, and it is difficult to see how the defendant would be bound by these decrees. Apart from that, I am clear in my mind that the suit was not on the ground of an unauthorized alienation but was based upon S. 52, T. P. Act. This conclusion derives support from the application put in on behalf of the defendant suggesting certain issues. The issues actually raised by the learned Judge also support this position. To entertain the application for amendment now, therefore, might give rise to questions of limitation, which I do not think it necessary to allow under the circumstances of this case.

If I am right in holding that the cause of action was under S. 52, T. P. Act, then any consideration as to the character of the property, and whether it was joint or not, would be irrelevant. Under the circumstances, although pleadings may not be construed strictly in this country, in my opinion, it would be changing the whole nature of the suit and manifestly unfair and unjust to the defendant to allow the amendment applied for at this stage. I must, therefore, reject the application for amendment.

The next question is whether the plaintiff as receiver can bring this suit to set aside the sale under S. 52, T. P. Act. Mr. Thakor raises two contentions in this respect. The first is, that as Bolton was appointed receiver in suit No. 359, he could not sue as receiver to attack the alienation by reason of the pendency of suit No. 410. The second is, that a receiver as such cannot bring a suit of this nature at all. As to the first contention, it is sufficient to state that if the propety was joint, and if the non-alienating members, who were owners of the property along with the alienating member, could sue the latter or his transferee, it is difficult to see why the receiver though appointed in suit No. 359 could not sue the latter. The plaintiff was appointed receiver of the whole of the joint family property by the High Court in suit No. 359. The order made by the High Court is as follows :

> For the reasons given in the accompanying judgment, the Court allows the appeal and appoints the appellant receiver on his giving security for the rent and profits of the immoveable property which may come into his hands. He will be receiver of the whole estate now in litigation with power to take immediate possession of the moveables. That will not include *stridhan* ornaments or clothes or other personal property now in actual use or wearing.
>
> There will be liberty to the parties to apply for further orders from the lower Court.
>
> The lower Court to define the further powers of the receiver and to fix any limitations within which those powers should be exercised and to pass appropriate orders providing for the residence and maintenance of defendant 1 and his family.

Accordingly the District Court conferred the following powers on the plaintiff as receiver:

> Whereas you have been appointed receiver as per order passed by the Honourable the High Court on the date 29th July 1915, in the above suit, you are conferred upon with such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of documents as the owner himself has, and to making an inventory of the moveable property which the wife of defendant 1 might claim as her own *stridhan* property and to let out immoveable property and to evict tenants whenever it may become necessary. The house in which defendant 1 and his family are now residing is allowed to be kept in their possession for the present.

The present suit was instituted with leave of the Court. Mr. Thakor says that the power of a receiver to sue would not include a power to sue to set aside a transaction or to recover property alleged to be belonging to the parties to a suit in which a person is appointed receiver on the ground of fraud or *lis pendens*, and he relies on certain observations of the Madras High Court in 35 Mad 578[1] to show that where a right to sue depends upon the election to be made by parties to a transaction or any volition is to be exercised as a condition precedent to bring the suit, then the receiver on behalf of such parties cannot sue. Apart from the fact that the decision relied upon goes upon its own facts and the terms of the order made by which the receiver in that case was appointed, in my opinion, there is no substance in this contention ; and the answer to it is the law contained in O. 40, R. 1, Civil P. C., which is in these terms—

> (1) Where it appears to the Court to be just and convenient, the Court may by order—
>
> (a) appoint a receiver of any property, whether before or after decree ;
>
> (b) remove any person from the possession or custody of the property ;
>
> (c) commit the same to the possession, custody or management of the receiver ; and
>
> (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.
>
> (2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

These words, in my opinion, are wide enough to empower the Court to authorize a receiver to bring any suit in his own name, the object of which is to preserve, collect or realize the property in suit, and where the receiver is authorized in this behalf, he may sue in his own name. The grounds upon which the suit is based seem to me to be immaterial. If the owner can bring a suit to recover his own property and has a cause of action to do so, it is difficult to see why the receiver, who has the same powers as the owner has to bring a suit and who is authorized by the Court in that behalf, cannot bring such a suit. The receiver appointed, in my opinion, when properly authorized, would have the same powers as the owner as regards the property; and if the owner could not have sued for possession of the property, the receiver could not. But if the owner could bring a suit and has a cause of action, then I think the receiver would be entitled to sue on the cause of action, subject of course to his being authorized by the Court in that behalf. The objects for which a receiver is appointed are the preservation and realization of the subject matter of the litigation pending the determination of the rights of the parties. He is appointed for the benefit of all the parties concerned in the litigation and is the representative of the Court and the parties interested in the litigation. If the joint family can sue to recover possession of the family property, there is no reason why the receiver cannot. This brings me to the important question of *lis pendens* on which, as I have said, the suit is based. The old S. 52, T. P. Act, which applies to this case, is in these terms :

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[1] Mahamed Kasim Sahib v. Panchapakesa Chetti, (1911) 35 Mad 578=17 I C 233.

> During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

It is clear from the terms of this section, that the doctrine of *lis pendens* is not based upon notice, but it rests upon the ground that neither party to a suit can alienate the property in the suit pending the suit so as to defeat the rights of the other party. As the decisions show, it is based upon expediency, and it is immaterial whether the alienee *pendente lite* had or had not notice of the suit : *see* 1 De G & J 566.[2] The mere pendency of a suit will not prevent one of the parties from selling the property, the subject matter of the suit, but the purchase will in no manner affect the right of the other party under any decree which may be made in the suit, unless the property was sold with the permission of the Court. The section lays down the principle, which is in conformity with what Story in his "Equity Jurisprudence" observes that the effect of the maxim "*ut lite pendente nihil innovetur*" is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation. The right then being created by a statute and being restrictive of the ordinary rights of parties, the section, it is clear, must be construed strictly. The point to note is that this statutory right is given to the party to the suit other than an alienating party to have an alienation set aside so far as it is necessary for the protection of his own rights. It has been held that if the plaint is insufficiently stamped and is rejected and is then re-presented after making good the deficiency, an alienation between the two dates of presentation would not be subject to *lis pendens*. In a suit to cancel a deed of gift, where the plaint omitted reference to a particular property which the defendant sold before it was included in the suit by an amendment of the plaint, it was held that the sale was not affected by the doctrine of *lis pendens* : *see* 50 I C 727,[3] 41 All 534[4] and 57 I C 652.[5] I refer to these cases to show how strictly the section is interpreted. Although the learned Judge finds that the sale to the defendant's father is subject to the doctrine of *lis pendens* by reason of the pendency of suit No. 359, it is fairly conceded before us by Mr. Coyajee that that finding cannot be accepted and is not correct. That suit was instituted on 24th September 1912.

The sale in favour of the defendant's father was completed on 26th August 1912. There can be no *lis pendens* where an alienation has been effected before the institution of the suit; but it is argued,—and the learned Judge was inclined to accept the argument—that suit No. 359 was so connected with suit No. 410, or as the learned Judge puts it, was a mere continuation of suit No. 410, that both these suits practically are one and the same.

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[2] Bellamy v. Sabine, (1857) 1 De G & J 566=26 L J Ch 797=3 Jur (N S) 943=6 W R 1.

[3] Ashutosh Roy v. Ananta Ram, A I R 1919 Cal 40=50 I C 727.

[4] Wali Bandi Bibi v. Tabeya Bibi, A I R 1919 All 320=50 I C 919=17 A L J 569=41 All 534.

[5] Ramchandra v. Bhagwan, A I R 1920 Nag 92 =57 I C 652.

The learned Judge himself has observed in more than one place that there was no order consolidating the two suits. The fact remains that all the parties to the later suit were not parties to Suit No. 410. In that suit there were only two parties, Baburao as the plaintiff and Krishnarao as the defendant. In the other suit the plaintiff represented the third branch, and Krishnarao and Baburao and Baburao's transferees were party defendants. The rights of Sonubai, widow of Baburao, were not determined in suit No. 359, but they were determined in suit No. 410. There were two separate decrees made in the suits. There was no decree in suit No. 410 in favour of Gangaram or his branch, and the transferees were not parties to suit No. 410. There is no provision of law under which suit No. 359 could be considered to be a continuation of suit No. 410. The subsequent act of the Court in delivering a judgment in suit No. 410, even if it be admitted that it was done on the strength of the decree in suit No. 359, cannot alter the position in law or make suit No. 359 a continuation of suit No. 410. In these circumstances, the rights of the parties must be determined with reference to suit No. 410 and that suit alone. Now, suit No. 410 was brought by Baburao for partition of the family property originally against Krishnarao. In the list of the property there is an item of Rs. 75,000, which refers to three inam villages in the Satara District, (1) Chandoli, (2) Bamboli, and (3) Atit—as an approximate value of these villages. The plaintiff asked for a half share in the property by partition and for accounts. As stated above, after the decision in suit No. 359, suit No. 410 was taken up. Baburao in the meantime had died, and Sonubai as his widow had been brought on record. It appears that one Shankerrao claimed to be the adopted son of Baburao, and in 1921 he was also brought on record of this suit; but it is common ground that it is not necessary to consider the rights of Shankerrao in this litigation and on the points which arise in this appeal. The decree, which is made in suit No. 410 is at p. 64, and is as follows:

> It is declared that Sonubai or her husband, the deceased Baburao, has one-third share in the suit property. The said one-third share may be properly partitioned according to law and it should be separated and given. Accounts may be taken for determining as to how much moveable property there was belonging to the joint family on the date on which the suit No. 733 of 1921 was first filed in the High Court. The property that may have been disposed of by Krishnarao since the filing of the aforesaid suit may be deducted from the property mentioned in the plaint which is in the possession of the defendant.

The rest of the decree is immaterial. With all respect to the learned Judge, he seems to be under the impression that the suit was of the nature contemplated under O. 21, R. 63, that is a suit for a declaration that certain property in the possession of the defendant was liable to be taken in execution of the decree in favour of the plaintiff. On these facts it is argued (1) that the property was not specifically described in the plaint; and (2) that the decree having directed that any property which may have been disposed of by Krishnarao since the filing of the suit should be deducted from the property mentioned in the plaint which is in the possession of the defendant, no *lis pendens* would arise as against the defendant in this litigation.

Section 52, T. P. Act, lays down the conditions which create a *lis pendens.* One of the conditions is that in a pending suit a right to immoveable property must be directly and specifically in question. Then it provides that the property in regard to which the right is directly and specifically in question in the suit cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto under any decree which may be made therein, except under authority of the Court and on such terms as it may impose. The rules of procedure require that when any immoveable property is in question in a suit, it must be as far as possible specifically described in the plaint, and, if possible, by its boundaries. Mr. Thakor, therefore, says that, to start with, the two villages are described as being in the Satara District, whereas one of them, namely the village Chandoli, is in Poona District; and, secondly, no boundaries are given, and that even the names of the villages are not accurately written. It is true that a misdescription of the land in the pleadings will prevent the operation of the doctrine of *lis pendens* ; but if in spite of the misdescription the land is sufficiently identified, then the doctrine will apply. It has been held by the Calcutta High Court that an alienee who is aware of the identity of the property will be affected by *lis pendens* in spite of the misdescription. The question to my mind is not so much the knowledge of the alienee as to the identity of the land which he is buying and as to whether it is included in the suit or not, but the question is what was the property which the parties knew and believed was transferred pending the suit by one of the parties thereto. If it is found that the parties to the suit from the description given in the plaint knew what the properties were, in which a right was specifically and directly asserted, and if, as a result of the decree made therein, either that property or a part of it is allotted to the other party, then it is difficult to see why that party will not be entitled to rely upon the rule of *lis pendens* as against the alienee from his opponent in the suit.

It was not suggested in this case that the parties did not know what was the property to which the plaintiff Baburao asserted a right specifically and directly as being part of the joint family property. It was not suggested that the family was possessed of any Chandoli inam village situate in the Satara District. It was common ground that Krishnarao's mother had purchased a half share in the inam village of Chandoli in the Poona District and a similar half share in the inam village of Atit in the Satara District. It was this property which was valued at Rs. 75,000 by the plaintiff Baburao. It was not suggested on behalf of Krishnarao that he was not in possession of any Chandoli inam village in the Satara District. In this state of things, it is clear that the parties at any rate to suit No. 410 knew what was the property which was claimed to be the joint family property and as to which the defendant had denied the claim. If that is the position, and if Krishnarao alienated these two villages about which there was no mistake in the mind of Krishnarao and Baburao, a mere mistake in describing the situation of the property or a misspelling of the names of the properties would not affect the doctrine of *lis pendens* as against the present defendant. As a matter of fact I am not disposed to attach any importance to the alleged misspelling. It is said that even in the Poona District there was another village of Chandoli, but it was nobody's case, right from the time suit No. 410 was instituted up to the time of the decree in the present litigation, that the village now claimed in the receiver's suit was that other village of Chandoli. Nor was it suggested on behalf of the defendant in this case that there was a Chandoli village in the district of Satara. The principle, I think, which is deducible from the cases on which Mr. Thakor himself relies is, that if the property is capable of being sufficiently identified and is included in the decree made in the suit awarding the non-alienating parties' rights therein, then if it happens that his opponent transfers it pending the litigation and before the decree, it would not affect his share. A purchase made of land actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice affects the purchaser in the same manner as if he had notice, and he will accordingly be so far bound by the judgment or decree as not to be entitled to defeat the main object of the suit. Ordinarily the judgment of a Court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of an action is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired and such purchaser need not be made a party to the action.

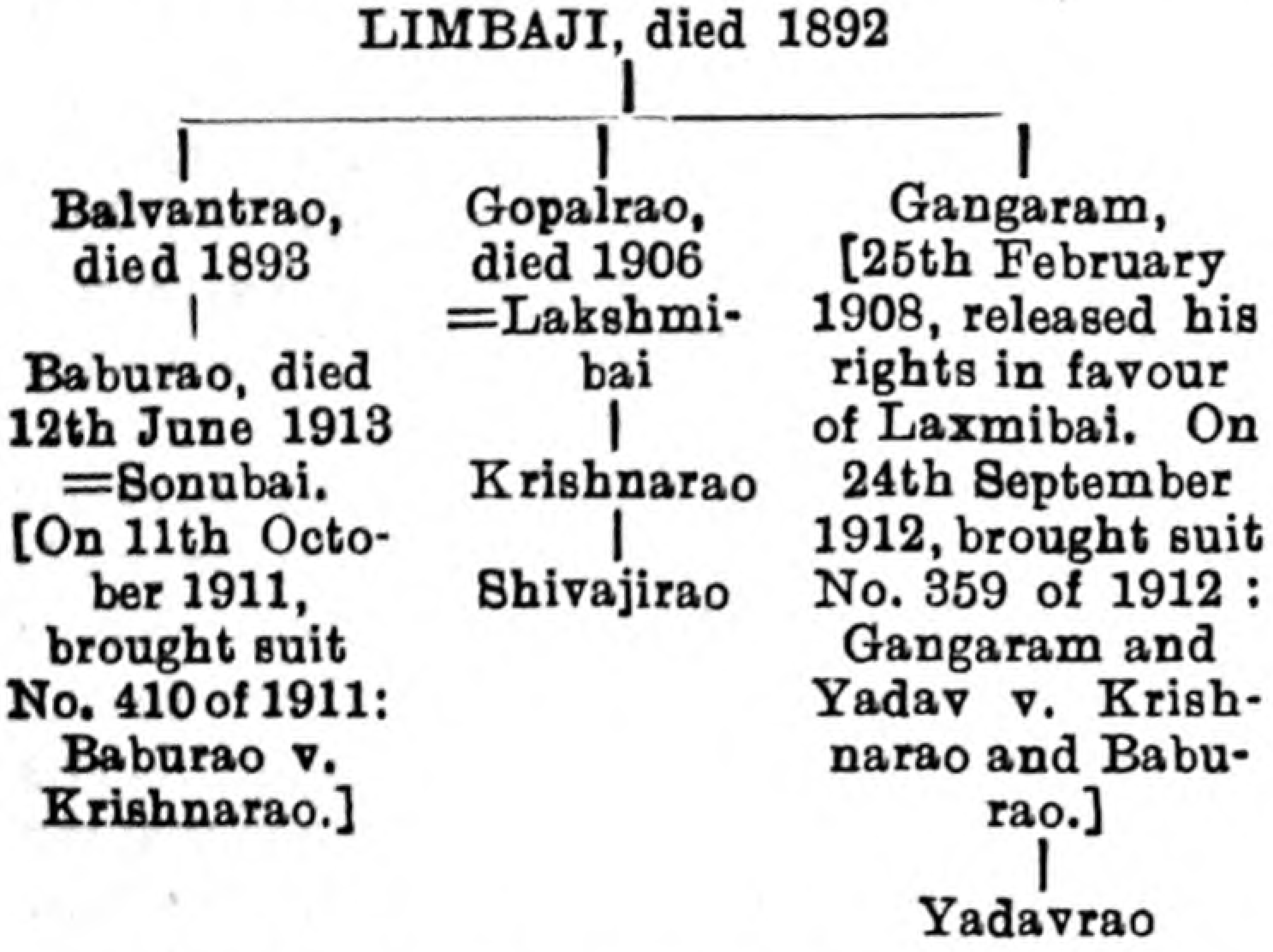
If this is the doctrine, then the point made has no force. The decree was made on the strength of the decree in suit No. 359. The latter decree leaves no doubt upon the point. These villages were held to be part of the joint family property and are ordered to be partitioned. When the decree was made in suit No. 410, the parties understood what the villages were, as by that time decree in suit No. 359 was made and suit No. 359 described the villages accurately. If these villages had not been alienated, then it is clear that Krishnarao would have had to bring them into hotchpot. It was never his case that the villages in suit No. 410 were different from those which his mother has purchased. If so, it is difficult to see how a transferee from him can put forward any contention now. Once it is remembered that a transferee *pendente lite* cannot rely on want of notice of the suit which is *lis pendens*, then I think the difficulties suggested would disappear. It seems to me to be clear from the record that everybody concerned understood what the properties were. The fact that the defendant raised no contention in this respect in his written statement or in the lower Court shows that he too was quite clear about the properties.

The second point made is that the doctrine of *lis pendens* would not apply as the decree itself directed that the property transferred by Krishnarao should be deducted from the property in the possession of the defendant. In the first place, reading the decree, it seems to me that this particular clause refers to moveable property which Krishnarao had alienated, and all that it says is that if it was found on taking accounts that he had alienated more than his share, then it should be debited against him. The evidence shows that until the termination of the two suits,—suit No. 359 and suit No. 410, — it was nobody's case that Krishnarao had alienated the immoveable property, and the case was that he had alienated a considerable part of the moveable property consisting of jewellery, cash and ornaments. It was after the decree in suit No. 359 was made, and after it was confirmed by the High Court, that the receiver started making inquiry and discovered that Krishnarao had made various alienations with regard to immoveable property. The meaning of the clause in question seems to me to be nothing more than that the property alienated, if any, should be accounted as a debit to the share allotted by the decree to Krishnarao. That seems to be in consonance with the rule on which the Court acts in adjusting the rights of co-parceners, including those of the alienees from some of them, in effecting partition in a partition suit.

One more point remains, and that is limitation. Mr. Thakor says that this was a suit for declaration and possession, and as the relief for possession was negatived, the suit must be treated as if it was one for declaration and therefore the suit which was filed in 1930 must be held to be barred under Art. 120, Limitation Act. The right to sue, he says, accrued when the unauthorized alienation was made by Krishnarao, or in any case on 19th April 1923, when the decree declaring the rights of Baburao was made in suit No. 410. I have no difficulty in rejecting that contention. In order to decide which article applies, and whether the suit is barred or not, regard must be had to the nature of the suit and the relief claimed. It is the right of the plaintiff to frame his suit so as to bring it under any article of the Limitation Act which is more favourable to him as giving a longer period than another. If he frames the suit wrongly, he takes the consequences. But so long as the frame of the suit is consistent with the cause of action as alleged, the mere fact that he had made a claim which on investigation is found to be unauthorized or which he was not entitled to make, cannot affect the question as to what article would apply. The question of limitation is to be decided with reference to the cause of action and to the frame of the suit when instituted and not with what is found at the end of the trial or the relief which is granted. I must therefore reject this contention.

The question then remains, what is the decree which should be made in this Court ? I have referred to the actual decree made by the lower Court. I have pointed out that the nature of the property has nothing to do with the question of *lis pendens*. The effect of *lis pendens*, if it applies, is that the alienation is bad and must be set aside either wholly or to the extent that it affects the rights conferred upon the non-alienating party by the decree in the suit. I therefore think that we must, following the section, give a declaration to the plaintiff to the effect that the alienation by Krishnarao in favour of the defendant is bad and cannot affect the rights of Baburao, or rather of his wife, that is to say, that *lis pendens* would affect the defendant's rights to the extent of the one-third share allotted to Baburao or his wife Sonubai in both the villages. As to how this is to be worked out, whether the purchaser is to be allowed to remain in possession of the whole or any part of the property, is a matter which does not arise in this suit, and that must be left to be decided in execution of the decrees in suit No. 359 and suit No. 410. I would therefore set aside the decree and substitute a decree as indicated above. I think a fair order to make under the circumstances of this case is that the plaintiff must get one-third of his costs from the defendant throughout, and the defendant do get two-thirds costs throughout from the plaintiff. Costs to be set off.

Tyabji, J.—This appeal arises out of a suit brought by a receiver appointed in another suit to which I shall presently refer. The reliefs sought in the present suit are a declaration that the sale deed relating to two villages dated 26th August 1932, and executed by one Krishnarao Gopalrao Gaikwad in favour of the adoptive father of the defandant was not binding on the plaintiff ; possession and mesne profits, and other reliefs. Limbaji Gaikwad was the common ancestor of the parties with whom the suit is primarily concerned. He died in 1892, leaving three sons Balvantrao, Gopalrao and Gangaram. Limbaji's first son Balvantrao died in 1893 leaving a son named Baburao who died on 12th June 1913, leaving a widow Sonubai. The second son of Limbaji, Gopalrao, died in 1906 leaving a son Krishnarao who died leaving a son Shivajirao. The third son of Limbaji Gangaram is alive and has a son Yadavrao. The following pedigree will show the relations between the parties :


LIMBAJI, died 1892
Balvantrao, died 1893
Baburao, died 12th June 1913 =Sonubai. [On 11th October 1911, brought suit No. 410 of 1911: Baburao v. Krishnarao.]
Gopalrao, died 1906 =Lakshmibai
Krishnarao
Shivajirao
Gangaram, [25th February 1908, released his rights in favour of Laxmibai. On 24th September 1912, brought suit No. 359 of 1912 : Gangaram and Yadav v. Krishnarao and Baburao.]
Yadavrao

Several suits for obtaining partition of the family property and similar reliefs have been instituted between members of the family. It is necessary to refer to two of them. First, on 11th October 1911, suit No. 410 of 1911 was brought by Baburao (representing the first of the three of the family branches) against Krishnarao (representing the second branch) for partition. The third son Gangaram was not made a party to this suit on the allegation that he had released his rights in the family property. It was during the pendency of this suit that Krishnarao on 26th August 1912 entered into the sale deed (Ex. 73) which is sought to be declared null and void in the present suit. Within a month of the sale deed, viz., on 24th September 1912, the second suit to which I have referred, suit No. 359 of 1912, was brought by Gangaram and his son Yadavrao against Krishnarao and Baburao; so that to this suit the representatives of all the three branches of the family were parties. The second suit was proceeded with, not suit No. 410 of 1911 though it was the earlier suit. The present plaintiff was appointed receiver in the second suit No. 359 of 1912 and has brought this suit for obtaining the reliefs that I have stated. I will in future refer to the earlier suit as suit No. 410, and the second one as suit No. 359 omitting the years of institution.

The first question that arises in the present proceedings is, under what right if any can the plaintiff bring the present suit ? He relies upon the orders of the Court appointing him receiver. The earlier of those orders was made by Batchelor, J. and Hayward, J., in Appeal No. 23 of 1915 which arose out of interlocutory proceedings in suit No. 359. The order, so far as relevant, is to the effect that the plaintiff was appointed receiver of the immoveable property which may come into his hands; and that he was to be receiver of the whole estate then in litigation, with power to take immediate possession of the moveables. Liberty was given to the parties to apply for further orders, and the lower Court was directed (1) to define the further powers of the receiver ; (2) to fix any limitation within which those powers should be exercised; and (3) to pass appropriate orders providing for matters not now relevant. In pursuance of the directions of the High Court, the Subordinate Judge, in whose Court suit No. 359 was pending, made on 31st July 1915 an order conferring upon the receiver the powers referred to in the Civil Procedure Code, O. 40, R. 1, sub-r. (1), Cl. (d) in terms of the clause itself. These powers include "all such powers as to bringing and defending suits as the owner himself has". The Subordinate Judge also gave some other directions to the receiver which are not now relevant.

It is argued on behalf of the appellant that the present suit is for the purpose of avoiding a sale on the principle contained in S. 53, T. P. Act, and that a receiver cannot be empowered to bring such a suit. Reliance is placed on 35 Mad 578[1] in which after reference to several general considerations it is stated (p. 581) :

> No authority has been cited to us, nor are we aware of any in support of the position that a receiver appointed in the circumstances of this case has any right to recover property which has been already sold away by the judgment-debtor on the ground that the sale is voidable as against the

creditors on the principle embodied in S. 53, T. P. Act.

Thus the judgment expressly refers to a receiver appointed in the circumstances of the case before the Court. The order there was made on an application that the receiver should be appointed for collecting the property or the price thereof. And yet the order made on that application did not authorize the receiver to recover the price of the goods from the defendant, but appointed him receiver specifically of certain property mentioned under twenty-two items in a schedule. It is also pointed out in the judgment that the receiver had not obtained permission to bring the suit in question. In my opinion the order in the present case must be construed on its own terms—just as the order in the decision to which I have referred was construed—and it must be determined whether the Court had—acting within its jurisdiction—authorized the institution of such a suit as the receiver has instituted. The order must of course be controlled by the limits of the jurisdiction conferred upon the Court to appoint receivers under O. 40, R. 1. The present order was couched in the very terms of Cl. (d) of that rule; its terms were not even made to conform to the special needs and circumstances with which the receiver had to deal. As to the limits upon the jurisdiction of the Court, its authority to remove any person from the possession or custody of property is restricted to cases where any party to the suit has a present right to remove the person in possession. It is not alleged that the order contravenes this provision. It is not pointed out what other obstacle hinders the Court from appointing a receiver for bringing such a suit as the present, nor is the peculiarity in the present suit specified, by reason of which this suit must be put out of the class of suits that the owner himself could have brought.

Whether the present plaintiff as receiver became entitled after the Court's order to bring the present suit cannot however be determined without attending to other considerations. The receiver was appointed receiver of the whole of the property then in litigation in a suit to which not only Krishnarao, whose act is sought to be impeached, but Baburao whose rights are affected, was party. The object of appointing the receiver was that the interests of all the parties to the suit (and particularly of Baburao) in all the estate should be safeguarded. The power to bring all such suits as the owner himself had must therefore have reference to all such suits as any of the parties to the suit could have brought for safeguarding their interests. Consequently the receiver was authorized to bring any such suit as Baburao could have brought: and the question whether the receiver could bring this suit must depend upon whether Baburao could himself have brought it. For dealing with this question—whether Baburao could have brought a suit for a declaration that the sale deed by Krishnarao dated 26th August 1912, was not binding on him—I must turn to suit No. 410. In that suit Baburao was the plaintiff and Krishnarao the defendant. The reliefs sought were that the property mentioned in the Schs. A and B may be equitably partitioned between the plaintiff and the defendant, that accounts be taken and other reliefs. One of the items in the schedule of which partition was sought was as follows: "Rs. 75,000—Inam villages in the Satara District—1. Chandoli, 2. Bomboli, 3. Hatid, the value of all these is about Rs. ."

In order that S. 52, T. P. Act, may be brought into operation, it has to be made out—I follow the language of the section as far as possible—that some right to the immoveable property (consisting of the two villages which are the subject matter of the present suit) was directly and specifically in question in suit No. 410. If that is made out, then under S. 52 the property could not be transferred by any party to suit No. 410 so as to affect the rights of any other party thereto under any decree therein. It was argued that the answer to the initial question must be in the negative, viz., that no right to the said villages was directly and specifically in question in suit No. 410 as the description of the villages in the plaint in that suit is not accurate. There is no doubt about the inaccuracy of the description. But for determining whether any right to a property is directly and specifically in question in any suit, an error in the description cannot be of any materiality so long as the Court and the parties understand which property is in question. Fraud or collusion might alter the situation, but subject to such considerations the description of the property is for the Court and for the parties concerned. If they are able to understand what property is meant and proceed with the suit, their understanding of the situation will determine which is the property the right to which is directly and specifically in question in the suit. In 41 All 534[4] at pp. 536 and 537, reliance is placed on Bennet in his work on "Lis Pendens" :

> It may be said in general that a *lis pendens* will be created whether the property involved in suit is described, either by such definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character or status, and by such reference that upon inquiry identity of the property involved in litigation can be ascertained.

There is no doubt that the villages referred to in the schedule in Suit No. 410 were the villages that are referred to in the present proceedings, nor is there any doubt that in the previous suit Baburao's right to have these villages partitioned was directly and specifically in question. The property therefore, could not under S. 52 be transferred or otherwise dealt with by any party—(and Krishnarao was one of the parties)—so as to affect the rights of any other party to the suit, (viz., Baburao), under the decree or order which may be made in the suit except under the authority of the Court, and on such terms as it may impose. It is not suggested that the transfer was made under the authority of the Court. Baburao's rights under the decree in Suit No. 410 will not therefore be affected by the transfer made by Krishnarao. Under the decree made in Suit No. 410 it was declared that :

> Sonubai or her husband the deceased Baburao, has one-third share in the suit property. The said one-third share may be properly partitioned according to law and it should be separated and given.

The decree is dated 19th April 1923. At the date of the decree Baburao had died and his representative Sonubai had been brought on the record, but for convenience and brevity I will hereafter speak of the decree being in favour of Baburao omitting reference to his representative Sonubai and substituting Baburao's name for that of Sonubai where her name is mentioned as his representative. The plaint in Suit No. 410 had been filed on 11th October 1911, and the decree was made on 23rd April 1923. In the interval Krishnarao had on 26th August 1912, executed the sale deed now in question (Ex. 73) alienating the two villages. It seems to me therefore that under S. 52, T. P. Act, the sale by Krishnarao in favour of the present defendant cannot affect the rights of Baburao under the decree made in Suit No. 410, viz., the sale cannot affect the declaration that Baburao had a one-third share in it, nor the order that the one-third share of the property should be partitioned according to law and separately given to him. It was argued however that S. 52, T. P. Act, expressly restricts its own operation to rights under any decree or order that may be made in the pending suit : that the property can be transferred or otherwise dealt with so long as it does not affect the rights of any party under the decree in the pending suit, and that a transfer affecting such rights of the parties as do not arise under the decree is not rendered nugatory by S. 52. In connexion with this argument our attention was drawn to the provisions in the decree in Suit No. 410 that :

> Accounts may be taken for determining as to how much moveable property there was belonging to the joint family on the date on which the suit (No. 733 of 1911) was first filed in the Honourable High Court. The property that may have been disposed of by Krishnarao since the filing of the aforesaid suit may be deducted from the property mentioned in the plaint which is in the possession of the defendant.

It is argued that these provisions of the decree preclude a disturbance of the dispositions by Krishnarao after the date referred to; that his dispositions were protected, and were to have full effect; and that the result was that Krishnarao's share was made responsible for his acts, but his alienations were ratified. I cannot agree. The intention of the decree was to make Krishnarao responsible for all the property in his possession : if he had unlawfully disposed of any such property it could not have been intended to perfect the deficient title of persons who could be traced to be in possession of immoveable property unauthorizedly transferred to them. In any case there is nothing to show that it was intended, after the institution of the suit for partition, that a single co-parcener should be chartered to act so as to render the partition sought in the suit nugatory and meaningless, and to deprive the parties of the protection vouchsafed by S. 52, T. P. Act.

If I am right in coming to the conclusion that Baburao was entitled to the benefit of S. 52, T. P. Act, and his rights under the decree in Suit No. 410 were protected against the transfer by Krishnarao in favour of the defendant's father, then in my opinion the plaintiff as the receiver in Suit No. 359 was authorized to represent the interest of Baburao and to bring a suit for a declaration that the right of Baburao was not affected by Krishnarao's unauthorized transfer. The argument that the receiver was appointed receiver in Suit No. 359 and not in Suit No. 410 has no materiality. As receiver, he was entitled (provided the Court authorized him) to step into the shoes of the parties to the suit in which he was appointed—*viz.*, Suit No. 359. One of such parties was Baburao, whose rights included the right to have it declared that the sale deed, dated 26th August 1912, made during the pendency of Suit No. 410 did not affect his rights under the decree in Suit No. 410; and that is the declaration that I would make. The learned Judge in the decree under appeal has held that the deed of sale by Krishnarao was void except as against himself, because Krishnarao purported to deal with the joint family property and because he could at the most deal with the joint family property to the extent to which one of several co-parceners can deal with joint property. The learned Judge says:

> It is not now contended before me that the property in suit was not the joint family property of the transferor Krishnarao and his other co-sharers or that it was the separate and self-acquired property of the transferor Krishnarao . . . .Krishnarao did not contend particularly that this was his self-acquired property. Defendant, who derives title through him—a title acquired after the filing of these suits—could not therefore raise that contention. As a matter of fact this defendant does not raise that contention now. Even if he were not precluded from raising that contention there is nothing in support of that contention. In the circumstances mentioned it was for the defendant to prove that the property in suit was the self-acquired property of Krishnarao and not the joint family property of himself and his uncle and cousins. And he does not attempt before me to prove this. In fact the theory of self-acquisition is not pressed or argued before me.

The objection to this view of the case however is that the present suit did not seek any relief on the ground of the property being joint and the transfer being void against the interests of the other coparceners. The plaint is very badly drawn. Much argument was addressed to us to the effect that plaints in the mufussal should be liberally construed. The plaint in this case was filed in the Court of the First Class Subordinate Judge, Poona. There could not have been any difficulty in getting the plaint more carefully drafted. Notwithstanding this I am prepared to make allowances. What is badly or carelessly expressed may be laboriously interpreted, and what has been unexpressed may be taken to have been implied, so long as this can be done without being unfair to the other side. But the suit cannot be allowed to be entirely altered in its nature. The only prayers in the plaint as originally filed were for a declaration that the sale deed of 26th August 1912, was illegal and null and void and that the suit property may be taken out of the possession of the defendant and given into the possession of the plaintiffs. By an amendment it was added that the declaration was to be on the strength of the decree in Suits Nos. 410 and 359 and S. 52, T. P. Act. It was argued for the plaintiff that the reasons why the sale should be declared void should be considered as surplusage, and that if the plaintiff could make out other good grounds for the sale being declared void, he should not be precluded from doing so. Reliance was in this connection placed on two paragraphs of the plaint: para. 2, where it is stated that the villages had been purchased out of the moneys of the joint family: that in Suit No. 410 Baburao sought to recover his share in the villages after stating that they belonged to the joint family and that the sale had been entered into by Krishnarao making false representations that the property was of his exclusive ownership. And in para. 2-A by an amendment it was suggested that "the Court would declare the whole of the estate in dispute is of the ownership of the joint family of Gaikwad".

But the ultimate difficulty in the plaintiff's way is that there was neither an issue on the point whether the villages belonged to the joint family nor any materials on which such an issue might be answered in the plaintiff's favour. The issues are limited to the question of *lis pendens*. No evidence was adduced on the question whether the property was joint or separate. Hardly any facts seem to have been proved during the trial. The only oral evidence seems to have been that of the receiver who knew nothing personally and could depose to no facts of his own knowledge. He only produced documents mainly relating to proceedings in Court. The learned Judge has allowed his mind to be affected by the statements in the judgments in the previous suits. But judgments can be deemed relevant under the Evidence Act only for very limited purposes. It was argued that they may be relied upon under Ss. 13 and 43, Evidence Act. Under those sections judgments are admissible only as establishing particular transactions in which a right, the existence of which is in question, was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from. In particular the reasons upon which the judgment is founded are not part of the transaction and cannot be regarded as such, nor can any finding of fact come to in the previous judgments other than the transaction itself be deemed to be relevant in the present case : 58 I A 125[6] at p. 136. The previous judgments therefore cannot be evidence of the fact that these villages were joint property or that they were purchased out of joint property. If that fact had been made an issue in the present suit, it would have been necessary to give evidence to establish it. The previous judgments would only have been evidence for showing that in the transaction consisting of the suits and of the judgments it had been asserted that the property was joint. In my opinion, therefore, the learned Judge had no materials before him on which he could decide the case on the basis that the two villages were joint family property and liable to be partitioned in execution of the decree in Suit No. 359. The decree should in my opinion have been restricted to the matters alleged and proved before him. The matters alleged and proved before him had reference only to the applicability of the doctrine of *lis pendens.* Accordingly the decree should merely have contained a declaration that the rights of Baburao under the decree in Suit No. 410, viz., to have the property partitioned and to receive possession of a one-third share therein, were not affected by the sale deed dated 26th August 1912.

The learned Judge has decided the case primarily on the basis that the property was joint and that therefore the sale was not authorized. But he has also held that the doctrine of *lis pendens* must be taken to vitiate the sale not only as against Baburao but against all parties to Suit No. 359. His reasons for holding to this effect are that the two Suits Nos. 410 and 359 were practically the same and that the sale must be subject to the rights of all the parties to Suit No. 359 also, that

though there was not a formal consolidation order, it was practically understood that the Suit No. 359 was the same as, or a continuation of, the former suit, viz., Suit No. 410, and the matters in dispute were decided in Suit No. 359 of 1912.

In my opinion this view is erroneous. The doctrine of *lis pendens* is enunciated in S. 52. It must be given effect to according to the terms of the section. The section refers only to transfers or dealings by parties to the pending suit so as to affect the right of any other party to the pending suit under any decree or order that may be made therein. Suit No. 359 was not pending at the time of the sale on 26th August 1912, and the parties to that suit cannot be brought under the terms of S. 52. The learned Judge has referred to a formal consolidation order. I am not aware of the precise class of orders to which reference is made. No authority was cited to us on this point. So far as I have been able to discover, the expression "consolidation" is applied to suits in the Civil Procedure Code only under O. 45, R. 4, which is restricted to pecuniary valuation in order to decide whether leave to appeal may or may not be granted. But I am unable to understand the process by which Suits Nos. 359 and 410 could have been so consolidated as to bring about the result that a person who was not a party to any suit until 24th September 1912, when Suit No. 359 was instituted, should be deemed to have been a party to a suit instituted on 11th October 1911, viz., Suit No. 410. Unless this process is requisitioned, the sale of 26th August 1912 would be unaffected by the rights of the parties subsequently introduced into the litigation—even if it is conceded that the litigation under the two suits must be considered to be one suit or proceeding for the purposes of S. 52, T. P. Act, in the sense that every party to the one suit must be deemed to be a party to the other suit—a proposition which I need hardly say a Court would pause before adopting. I would, therefore, set aside the decree made by the lower Court and instead of it make a declaration in the terms of the decree in Suit No. 410 in favour of the representative of Baburao. I agree in the order relating to costs proposed by the learned Officiating Chief Justice.

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[6] Gobinda Narayan Singh v. Sham Lal Singh, A I R 1931 P C 89=131 I C 753=58 I A 125 =58 Cal 1187 (P C).

K.B./A.L. *Order accordingly.*

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* A. I. R. 1937 Bombay 260

WASSOODEW, J.

Emperor

v.

Yeshvant Vithu — Accused.

First Criminal Sess. Case No. 10 of 1937, Decided on 26th January 1937.

*** (a) Criminal Trial—Jury—Discharge of—Court's power under S. 227, Criminal P. C., to alter charge—Alteration necessitating discharge of jury sworn in and empanelled—Such jury can be discharged and new jury can be empanelled—Provisions in Criminal Procedure Code as to discharge of jury are not exhaustive.**

The powers of a Court to alter a charge under S. 227, Criminal P. C., are very wide. If therefore alteration of charge leads necessarily to the discharge of former jury which is not competent to try the altered charge, the Court can discharge the former jury although it is sworn in and empanelled. There is nothing in the Criminal Procedure Code or in the Bombay High Court Rules that limits the powers of Court to alter charge. Moreover provisions as to discharge of jury as contained in Criminal Procedure Code are not exhaustive. [P 260 C 2; P 261 C 1]

(b) Bombay High Court Rules, R. 865—'Given in charge to the jury'—Meaning of.

The question whether the prisoners have been given in charge to a jury must be determined by reference to the form of the oath administered and the procedure followed thereafter. When after the Clerk of the Court calls the prisoner to the bar and makes the following statement: "Members of the jury, the prisoner stands indicted for that he, on the (stating the substance of the offences charged in the indictment). To this indictment he has pleaded not guilty and it is your charge to say, having heard the evidence, whether he is guilty or not", the prisoner is said to have been given in charge to the jury; but where the substance of the offence charged in the indictment has not been stated to the jury and there is nothing except the fact that the jury is sworn in and allowed to be challenged with a view to their trying the prisoners in due turn, the prisoners cannot be said to have been given in charge to the jury. [P 261 C 1, 2]

K. Mc. I. Kemp and *Rustom J. J. Modi* — for the Crown.

Noshirvan H. Jhabvala — for Accused.

Judgment.— In this case the four prisoners have been committed for trial on a charge under S. 304, I. P. C. On reading the record and after hearing the Advocate-General, I decided to alter the charge to one of murder as it was entirely within the province of the jury to decide from the nature and effect of the injury the question of the intention and knowledge of the prisoners. Upon the charge as framed by the committing Magistrate the prisoners are entitled to be tried by a common jury. The common jury which has been empanelled to try cases would ordinarily have tried the prisoners if the charge had not been altered, their case being one of the cases set down for trial by the said jury. Upon the alteration of the charge to one of murder the prisoners are entitled to be tried by a special jury.

The learned counsel who now appears on behalf of one of the prisoners has raised an objection to the alteration of the charge on the ground that the prisoners having been given in charge to a common jury empanelled to try their case along with others they cannot be given in charge to a special jury and that therefore the alteration is illegal. The main force of the objection was directed to the support of a proposition which may be shortly stated as follows: By the terms of Ss. 282, 283, 305 and 465, Criminal P. C., special provision is made for the discharge of the jury in particular circumstances only, and as there is no other provision for the discharge of a jury except in those circumstances, any alteration of a charge leading to such discharge would be illegal and irregular; and also by the terms of S. 271 and the following sections of the Criminal Procedure Code, dealing with the plea of the accused and the choosing of a jury, the trial of the prisoners must be deemed to have commenced upon the empanelling of the jury and the administration of oath to the jurors, and the prisoners deemed to have been given in charge to the jury, so that, according to the prevailing practice and the rules of this Court, that jury can under no circumstances be discharged; and that the alteration of the charge, if it entails that result, must be regarded as illegal. I was referred to Archbold's Criminal Pleading, Evidence and Practice, [(1931) Edn. 28, p. 173] in support of the proposition that arraignment of prisoners is tantamount to the giving of the prisoners in charge to the jury, the arraignment consisting of calling the prisoner to the bar, reading the indictment to him and asking him whether he was guilty or not. The passage dealing with 'arraignment' does not support that view. But apart from it, it is wrong to suppose that 'arraignment' of the prisoners has taken place in the present case. With regard to the first part of the argument relating to the conditions under which a jury can be discharged, the Criminal Procedure Code cannot be said in that respect to be exhaustive. For instance there is no provision for discharge of the jury upon termination of a trial. The only rule regarding the empanelling of another jury without discharging the former is contained in R. 865 of the High Court Rules which provides as follows :

> If from any cause it is inconvenient for all the prisoners who have had their challenges in respect of a particular jury to be tried by such jury, another jury may be empanelled to try them without the former jury being formally discharged: provided only that such prisoners have not been given in charge to the former jury.

Although that rule does not govern the present case, it is helpful to show under what circumstances a fresh jury cannot be empanelled on the ground of inconvenience. In this case it is not a matter of inconvenience which compels the discharge of the jury. The want of jurisdiction of the former jury to try the accused upon the altered charge necessitates its discharge. The Court's powers, as contained in S. 227, Criminal P. C., to alter a charge are very wide. Any restriction of those powers must inevitably lead to failure of justice. If the Court's power under S. 227 can be exercised within certain limits as contended, the provisions of the section would be rendered nugatory. If therefore the alteration of the charge leads necessarily to the discharge of the former jury, that result must be implied in the power of the Court to alter the charge. Indeed there has been a challenging of the common jury already empanelled, but that fact cannot affect the power of the Court to alter the charge. With regard to the latter part of the argument, it seems to me that it is based upon a misconception of the expression "given in charge to the jury". That expression does not occur in the Criminal Procedure Code and is used in R. 865 of the High Court Rules in a technical sense. Even if the prisoners were given in charge to a common jury, R. 865 will not operate as a bar to the trial of the prisoners by a special jury upon the altered charge. Apparently R. 865 is not designed to meet such a case. The question whether the prisoners have been given in charge to a jury must be determined by reference to the form of the oath administered and the procedure followed thereafter. The oath administered to the jury is in the following form :

> You swear that you shall well and truly try and true deliverance make between our Sovereign Lord the King-Emperor and the prisoner at the Bar whom you shall have in charge and true verdict give according to the evidence.

That oath itself does not constitute the giving of the prisoners in charge to the jury, for the indictment of the prisoners has subsequently to be read to the jury with the following direction :

> On this charge the prisoner at the Bar has claimed to be tried : it is your duty to hearken to the evidence and to return a true verdict.

Upon the paragraph "Proclamation and giving the prisoner in charge to the jury" in Halsbury's Laws of England, (Vol. 9, p. 160), the following statement occurs :

> At the assizes, but not at quarter sessions, in cases of treason or felony, when a full jury has been sworn, a proclamation is made inviting anyone who can inform the Court of any crimes committed by the prisoner at the bar to come forward. The Clerk of the Court then states the effect of the indictment, or that part of it on which the defendant has been arraigned, to the jury, and gives the prisoner in charge to them.

That has not been done in the present case. As to the manner in which a prisoner is given in charge to the jury, there is a reference in Archbold's Criminal Pleading, Evidence and Practice to the same effect as the above statement in Halsbury's Laws of England. It is clear therefrom that after the Clerk of the Court calls the prisoner to the Bar and makes the following statement :

> Members of the jury, the prisoner stands indicted for that he, on the (stating the substance of the offences charged in the indictment). To this indictment he has pleaded not guilty and it is your charge to say, having heard the evidence, whether he is guilty or not,

the prisoner is said to have been given in charge to the jury. The substance of the offence charged in the indictment has not in this case been stated to the jury and except the fact that the jury is sworn and allowed to be challenged with a view to their trying the prisoners in due turn, nothing has been done to warrant the supposition that the prisoners have been given in charge to the jury. I, therefore, overrule the objection and direct that the trial shall take place upon the altered charge with a special jury.

B.D./D.S. *Order accordingly.*

A. I. R. 1937 Bombay 262

BROOMFIELD AND TYABJI, JJ.

Jayantilal Ranchhodlal and *others* — Defendants 1 to 4 — Appellants.

v.

Popatlal Kevaldas Zaveri and *others* — Plaintiffs — Respondents.

First Appeal No. 23 of 1931, Decided on 27th August 1936, from decision of Joint First Class Sub-Judge, Ahmedabad, in Special Civil Suit No. 1277 of 1928.

(a) Contract Act (1872), S. 251 — Partner's authority to borrow money — Law in India is similar to that in England — Why authority to borrow is withheld in non-trading firms explained.

The law laid down in S. 251, Contract Act, was probably intended to be the same as in England and in the majority of cases it is the same. But in India the rule as to implied authority has been enacted in a particular form, and one must have regard to the language of S. 251. In India if a partner in a firm of auctioneers, farmers or quarry owners has no authority to borrow money, the reason must be not because the partnership does not buy and sell goods, but because in the language of S. 251, the borrowing of money is not an act necessary, or usually done in carrying on the business of such a partnership : *A I R 1924 Bom 260, Expl.* ; *A I R 1932 Bom 539, Ref.* [P 263 C 2 ; P 264 C 1]

(b) Principal and Agent — Act of agent belonging to authorized class — Principal's benefit is immaterial — Partner authorized to borrow money—Creditor need not look to its application.

Where a partner can borrow money for the purpose of the business on the credit of the firm, no duty is cast on the person advancing the money to make any further inquiries. If the act belongs to an authorized class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit. [P 265 C 1]

G. N. Thakor, *V. N. Chhatrapati* and *B. G. Thakor* — for Appellants.

M. B. Dave and *P. A. Dhruva* — for Respondents 1 and 2.

Broomfield, J.—The suit from which this appeal arises was brought by respondents 1 and 2 to recover a sum of Rupees 6,051 on four chithis dated 6th October 1925, 15th November 1925, 4th January 1926, and 21st February 1926. The amounts of these chithis were Rs. 2,500, Rs. 1,000 Rs. 600 and Rs. 1,000, and they were borrowed by defendant 5 as managing partner of the Jayantilal Ranchhodlal Cotton Pressing Company, defendant 1 in the suit. Plaintiffs are a firm of money-lenders doing business at Viramgam. The defendant company does business at Viramgam where they have a cotton press. Defendants 2 to 4, the other partners in the company, reside in Ahmedabad and the business of the company was managed entirely by defendant 5 who resided in Viramgam. The moneys were all borrowed in the name of the company. The trial Judge has passed a decree against all the defendants.

The only question in this appeal by defendants 1 to 4 is whether the company, i. e. defendant 1, and the partners, defendants 2 to 4, are liable for these debts contracted by defendant 5. There is no evidence that defendants 2 to 4 authorized defendant 5 to borrow these particular sums. They are not shown in the books of the company which were kept by defendant 5. It has not been proved that the money was necessary for the business of the firm, nor that it was in fact used for that business. There is nothing to show that defendants 2 to 4 knew anything about these advances until they received a notice from the plaintiffs just before the suit. The liability of the partners other than defendant 5, therefore, depends mainly on the question whether S. 251, Contract Act, covers the case. That section provides :

> Each partner who does any act necessary for, or usually done in, carrying on business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

As I have mentioned, defendant 5 was in sole control of the management of the defendant company. The other partners never even visited Viramgam. Defendant 2, the only partner who has given evidence, has admitted that it was sometimes necessary to borrow money for the business, and that defendant 5 used to do so in his capacity as managing director or managing partner. That is not an admission of defendant 5's authority to borrow these particular sums, but it is an admission of his authority to borrow money for the partnership when necessary. The case-law on S. 251 has been summed up by Mulla, J., as he then was, in 48 Bom 176[1] at p. 182. The learned Judge cites the well known passage from Story on Agency which has been approved by the Privy Council in 6 Moor P C 152[2] at p. 193:

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1. Saremal Punamchand v. Kapurchand, A I R 1924 Bom 260=77 I C 548=48 Bom 176 = 25 Bom L R 1093.
2. Bank of Australasia v. Breillat, (1847) 6 Moor P C 152=1 Jur (N S) 189 (P C).

> (Section 124) Every partner is . . . . in contemplation of law, the general and accredited agent of the partnership ; or, as it is sometimes expressed, each partner is *proepositus negotiis societatis* ; and may consequently bind all the other partners by his acts in all matters, which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property ; he may buy goods on account of the partnership ; he may borrow money, contract debts, and pay debts on account of the partnership ; he may draw, make, sign, endorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, checks, and other negotiable paper, in the name and on account of the partnership.

Story, in the passage from which the citation was made, went on to point out that :

> (Section 125) . . . Each partner is an agent only in and for the business of the firm ; and therefore his acts beyond that business will not bind the firm. Neither will his acts, done in violation of his duty to the firm, bind it when the other party to the transaction is cognizant of, or cooperates in such breach of duty.

On the evidence in this case it is possible that these moneys were borrowed by defendant 5 for his private purposes and not for the firm. If that was so to the knowledge of the plaintiffs, the firm and the other partners would not be liable. But I do not think that there is any evidence to justify a finding that plaintiffs were aware that defendant 5, who borrowed these moneys in the name of the firm, did not require them for the firm but for his private purposes. On the occasion of the first of the four advances, the person who was sent for the money was one Jatashankar. He has been examined as a witness and he stated that he was a servant of defendant 5, but not in the employment of defendant 1 firm. It also appears from the plaintiffs' books that defendant 5 and this man Jatashankar together settled the account with the plaintiffs, that is to say agreed on the balance due on 30th October 1925, when defendant 5 purporting to act on behalf of the firm signed an acknowledgment of the debt. But on the record there is no reason to suppose that the plaintiffs knew that Jatashankar was defendant 5's private clerk only. The other three loans were taken by Ratilal who was admittedly a clerk employed by defendant 1 firm. In each of the four cases the receipts were signed by the person taking the money in the name of the firm. Reliance has been placed on the fact that on no previous occasion was money borrowed from the plaintiffs on chithis. The plaintiff Popatlal says in that connexion :

> Defendant 5 has not sent chits during the other years to borrow money as it was not our practice then. The practice of borrowing money on chits was introduced two years before the date of the suit.

It has been suggested that the change of procedure is an indication that the plaintiffs knew that this money was required by defendant 5 for himself. The evidence does not show exactly how the money was borrowed on previous occasions. But it can hardly have been done in a way to make it more obvious that defendant 5 was acting for the firm. Three of the chithis are on the firm's note-paper, and in all of them it is stated, twice over, that the money is borrowed in the name of the firm. I think, on the whole, there is no justification for holding that the plaintiffs were aware that defendant 5 did not require this money for the purposes of the firm. Then, the learned counsel for the appellants has argued that this was not a trading partnership. It did not buy and sell goods, and therefore, on the authorities, defendant 5 had no implied authority to borrow money. In that connexion Mulla, J. in *Saremal Punamchand* v. *Kapurchand*[1] said (p. 182) :

> Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. But the firm must be a trading firm. A firm is a trading firm if its business consists in buying and selling . . . . Where, however, the business is not of a commercial nature, e. g., where it is a professional business . . . . . or even the business of a farmer . . . . or a quarry worker . . . . where there is no buying and selling of goods, or an auctioneer . . . . no partner can borrow or pledge the partnership property so as to bind his co partners.

Various English authorities were referred to in support of this proposition. I doubt very much whether the definition of a trading firm as one whose business consists in buying and selling is intended to be an exhaustive one. The point did not arise in *Saremal Punamchand* v. *Kapurchand*[1] as it was admitted that the partnership in that case did carry on the business of buying and selling goods. In this connexion I may refer to the judgment of Murphy, J. in 34 Bom L R 1137[3] at p. 1142. The law laid down in S. 251, Contract Act, was probably intended to be the same as in England, and in the majority of cases it is the same. But in India the rule as to implied authority has been enacted in a particular form, and we have to have regard to the language of S. 251. In this country if a partner in a firm of auctioneers, farmers or quarry owners, has no authority to borrow money, the reason must be, I think, not because the partnership does not buy and sell goods, but because in the language of S. 251 the borrowing of money is not an act necessary, or usually done in carrying on the business of such a partnership. Moreover, in the present case, S. 251 must be read in connexion with certain other sections of the Contract Act,—S. 187 which says that an authority is said to be implied when it is to be inferred from the circumstances of the case, the second part of S. 188 which says:

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[3] Gordhandas v. Raghuvirdasji, A I R 1932 Bom 539=141 I C 676=57 Bom 176=34 Bom L R 1137.

> An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business ;

and S. 237 which says :

> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

From the evidence in the case, and in particular from plaintiff's accounts which have been produced, it is clear that money was required for running the defendants' business. Hessian, hoops, fuel and sundry stores had to be purchased, and these purchases were made by defendant 5 in Viramgam. Defendant 2 in the beginning of his deposition stated that money used to be sent to Viramgam when required by hundis and in cash, and that the stores and the goods required for the factory were purchased in Bombay, Calcutta and elsewhere, and sent to Viramgam. But later on in cross-examination he admitted that the factory had dealings with the plaintiffs from 1964 Samvat onwards, and that fuel, hessian, oils, hoops, stores, etc., were purchased locally. 1964 Samwat would be 1908. The accounts prior to 1914 have not been put in, but from 1914 and 1921 it is clear that the plaintiffs were to a considerable extent, if not entirely, financing the defendant company. In all the years, 1914, 1915, 1916, 1917, 1918, 1919 and 1920, considerable sums were advanced by plaintiffs. Many of them were comparatively small amounts,—Rs. 250, 300, 400 and so on, but at the same time there are several large items of Rs. 1,000, 1,200 and 2,000. In January 1921, an amount of Rs. 3,000 was borrowed. In some of these years a large balance remained due to the plaintiffs at the end of the year, which contradicts a statement in the written statement that whenever there had been any borrowing the accounts had been settled immediately and no considerable amount was left outstanding at the end of the year.

Some of the loans shown in these accounts have been explained or sought to be explained by defendant 2 as having been due to special causes, for instance, he suggests that the advance of Rs. 3,000 in January 1921, was necessitated by a fire in the factory, and other advances are said to have been due to the fact that for a period of five years the defendant company leased a ginning factory and were running that as well as the pressing factory. It cannot be said to be proved that the advance of Rs. 3,000 in January 1921, was due to the fire, and the other point seems to me to be immaterial, because the ginning factory was a part of the business of defendant 1 firm. When these accounts are considered as a whole, I think it is not possible to doubt that borrowing money was both necessary and usual in this business of the defendants, run as it was. At any rate that was so up to 1921. After that time as appears from the plaintiffs' accounts the borrowing was only nominal. There is no suggestion that the entries relating to this borrowing of money by defendant 5 from 1914 to 1921 are not contained in the books of the defendant company. The borrowing therefore must have been done with the knowledge of defendants 2 to 4. Does it lie in their mouths therefore now to deny that defendant 5 had authority to borrow ? Obviously they cannot deny it so far as the borrowing up to 1921 is concerned. The fact that borrowing on a considerable scale ceased from 1921 is no doubt a point in defendants' favour. But, as far as I can see, there is no evidence that anything had happened between 1921 and 1925, to the knowledge of the plaintiffs, which had changed the system of business, so that defendant 5 who had authority to borrow up to 1921 had no longer such authority in 1925. A point was made to the effect that the loans in suit were made in the off-season when the factory was not working. The working season is from February to May, and the last of the loans was in February. The third of them was in

January just before the season commenced. No importance can really be attached to the fact that the other advances were in October and November because a very large number of other advances which cannot be disputed were made at all times of the year other than from February to May. It is hardly necessary to point out that there was no obligation on the plaintiffs to see to the application of the moneys. In that connexion it is only necessary to refer to illus. (d) to S. 251 and the observations of Mulla, J. in 48 Bom 176[1] where he says (p. 183) :

> Where a firm is a trading firm, so that one partner can borrow money for the purpose of the business on the credit of the firm, no duty is cast on the person advancing the money to make any further inquiries. . . . .
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> If the act belongs to an authorized class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit.

The learned trial Judge has made some very severe strictures on the evidence of defendant 2. In my opinion these are not justified. Defendant 2 was an absentee partner. He had no personal knowledge of the business of the firm and he was cross-examined about matters many years old. At the same time his admissions do make it very difficult indeed to hold that defendant 5 had no implied authority to borrow on the credit of the firm. We think there are no sufficient grounds for differing from the view taken by the trial Court and dismiss the appeal with costs.

Tyabji, J.—The claim out of which this appeal arises was based on certain advances made by the plaintiffs to defendant 5 who was a partner in the firm which is defendant 1. The decision depends upon the application of S. 251, Contract Act. The section requires it to be determined whether the acts on which the plaintiffs base their suit—the acts consisted of defendant 5 taking the loans which are sued upon—were acts necessary for, or usually done in, carrying on the business of such a partnership as that of which he was a member. One of the arguments before us was that the business of the partnership, pressing cotton, was not a trading business, and that therefore it must be taken that there was no authority to borrow. Certain remarks of Mulla, J. in 48 Bom 176[1] were relied upon. Taken out of their context, they might be considered to support the argument. But Mulla, J. was not dealing with the point in the form in which it now arises. He was only concerned with the question whether as soon as it is shown that a partnership business is a trading business, (*i. e.*, that the purchase and sale of goods and property are contemplated as part of the business of the partnership), the partners must have authority to borrow.

There is nothing, that I can see, in S. 251 requiring that partnership be put under defined categories : such categories as partnerships for pressing cotton (such as the one we have before us) or partnerships known under other denominations under which businesses are generally known or classified ; nor do I see anything in S. 251 justifying a decision (based on the denomination under which the partnership is generally referred to) apart from a consideration of the business actually carried on by the particular firm in question. I am strengthened in this view by the fact that the Court of Appeal in England differing in this respect from the Divisional Bench declined to express an opinion upon the question whether as a matter of law an auctioneer was a trader, and whether therefore a partner in a firm of auctioneers had implied authority to bind the firm by accepting a bill in the firm name : (1907) 2 K B 684.[4] The decision of the Divisional Bench is reported in (1906) 2 K B 321.[5] The Court of Appeal held that part of the business of the particular partnership before them was the purchase and sale of goods and property, and that in that respect it was a trading partnership. They declined to affirm or to disaffirm, as they were invited to do, the propositions that the firm was a firm of auctioneers ; that members of a firm of auctioneers have implied authority to bind the firm by accepting bills in the firm name ; and that accordingly the particular partner had such authority. Moreover S. 251 deals primarily with the extent of authority that a partner must be deemed to possess as between himself and his co-partners. It is obvious that the position of third parties dealing with the firm may, as against individual partners, be different from the position of the partners amongst themselves. The partners may be taken to know exactly what the nature of their business is, and what is necessary for carrying it on. The authority of each member of the firm to bind his co-partner may rest on different principles and circumstances from those on which strangers dealing with the firm might be governed. There may be a restriction upon the power of any partner placed by agreement between the partners. Even in such cases, third parties are not necessarily debarred from binding the firm by acts done by that individual partner in contravention of such an agreement. Third parties are debarred only if they have notice of the restrictive agreement : S. 251, Exception.

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[4] Wheatly v. Smithers, (1907) 2 K B 684=76 L J K B 900=97 L T 418=51 S J 551=23 T L R 585.

[5] Wheatly v. Smithers, (1906) 2 K B 321=75 L J K B 627=95 L T 96=54 W R 537=22 T L R 591.

Adverting to the facts of this case, the plaintiffs are entitled to say that in accordance with S. 187, Contract Act, the ordinary course of business must be one of the circumstances from which it may be inferred that defendant 5 had authority to bind the firm, defendant 1, to pay the loans taken by him, ostensibly as a partner of that firm ; and that the inference so drawn cannot be displaced unless the case is brought under the exception to S. 251, *i. e.*, unless it is proved that the plaintiffs had notice of the restriction placed on the inferred authority of defendant 5. It has been shown by evidence that defendant 5 was in the habit of borrowing moneys from the plaintiffs for the purposes of the firm in which he was a partner, so as to bind the firm. It is true that defendant 2 says that the loans which the firm recognized as binding upon it, had been taken for special objects on unusual occasions. There is no evidence to establish that the loans were only of this nature. But even if there had been any such evidence, it would have pointed to a restriction on the powers of defendant 5 as a partner, of the kind referred to in the exception to S. 251. It would have been an internal arrangement of which third parties must be given notice if an act in contravention of the internal arrangement is not to bind the firm. Third parties cannot be presumed to know that there are any special circumstances affecting the firm on account of which a partner is authorized to take loans to-day, and that those circumstances are absent the next day, so that he is no more empowered to borrow. No notice is alleged of either the existence or the cessation of the conditions on which the authority of defendant 5 to borrow on behalf of the firm is supposed to have depended.

No sufficient reason is shown for taking a view of the evidence as a whole, different from that taken by the trial Judge. I agree however that the strictures passed by the learned Judge against defendant 2 are uncalled for.

B.D./D.S. *Appeal dismissed.*

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* A. I. R. 1937 Bombay 266

RANGNEKAR, AG. C. J. AND TYABJI, J.

Bombay Namdeo Co-operative Agency Ltd. — Appellant.

v.

Virdhaval — Respondent.

First Appeal No. 279 of 1930, Decided on 20th July 1936, against decision of Joint First Class Sub-Judge, Poona, in Suit No. 1522 of 1929.

*** (a) Bombay Court of Wards Act (1 of 1905), Ss. 4, 5, 10 (1) and 37—Temporary custody under S. 10 (1) is different from assumption of superintendence under S. 4 (1) —District Court taking temporary custody of disqualified land-holder's property — Promissory note executed by such land-holder—Subsequent assumption of superintendence by Court of Wards under S. 4 (1) — Assumption of superintendence commences when sanction for same is obtained from Government and not from date of order under S. 10 (1) – Promissory note is valid and binding as S. 37 does not apply.**

Under the Bombay Court of Wards Act, taking temporary custody of the property of a disqualified land-holder or who is about to be disqualified under S. 5, Bombay Court of Wards Act, is not the same thing as assuming superintendence under S. 4 of the Act. The conditions necessary for the latter are : (1) disqualification under S. 5; (2) previous sanction of Government; (3) the actual assumption by the Court of Wards or some declaration to that effect; (4) notification in the Government Gazette setting out the fact of assumption and the date of the sanction. When these conditions are fulfilled, then only the property of the landholder is deemed to be under the superintendence of the Court of Wards. [P 270 C 1, 2]

Where a District Court by an order under S. 10 (1) orders temporary custody of the property of a ward but subsequently the Court of Wards assumes superintendence over him and sanction for such assumption is obtained from the Local Government, the assumption of superintendence does not relate back to the date of order under S. 10 (1) but the property of the ward must be deemed to be under the superintendence of the Court of Wards under S. 13 (2) from the date when the sanction of the Government is obtained. The prohibition contained in S. 37 of the Act only applies when the Court of Wards assumes superintendence. [P 270 C 2]

A promissory note executed by the ward when his property is under temporary custody under S. 10 (1) is valid and binding upon him and S. 37 does not apply to such case. [P 270 C 2; P 271 C 1]

(b) Interpretation of Statutes — Statutes encroaching on rights of subject — They should be strictly construed and interpreted so as to respect such rights.

Every statute is to be expounded according to its express or manifest intention, and all cases within the mischief aimed at are, if the language permits, to be held to fall within its remedial influence. Statutes which encroach on the rights of the subject whether as regards person or property are subject to a strict construction in this sense, and they should be interpreted if possible so as to respect such rights: *The Sussex Peerage*, *(1844) 11 Cl & F 85*; *Fennel* v. *Riddler*, *(1826) 4 L J K B (O S) 207* and *Attorney-General* v. *Horner*, *(1884) 14 Q B D 245*, *Rel. on.* [P 271 C 1]

G. N. Thakor and *K. A. Padhye* — for Appellants.

P. B. Shingne — for Respondent.

Rangnekar, Ag. C. J.—The appellants brought a suit to recover Rs. 4,000 odd and interest thereon, on a promissory note executed by one Sardar Dabhade in favour of one Murlidhar on 19th August 1925, and assigned by the latter to them. The suit was brought against the Sardar by his guardian ad litem the Collector and Court of Wards, Poona. The main defence to the suit was that the Court of Wards had assumed superintendence of the property of Sardar Dabhade on 22nd April 1925, and that under S. 37, Court of Wards Act (Bom. I of 1905) the Sardar was incompetent to enter into any contract involving pecuniary liability. It was contended on behalf of the plaintiffs that the Court of Wards assumed superintendence on 10th July 1926, and not on 22nd April 1925, and that therefore the promissory note, having been executed prior to the assumption of the superintendence of the property of the Sardar by the Court of Wards was outside the prohibition of S 37 of the Act. This contention was rejected by the learned First Class Subordinate Judge, who held having regard to the documentary evidence tendered on behalf of the defendant, that the Court of Wards had assumed superintendence on 22nd April 1925. The plaintiffs now appeal from that decision. The material facts are as follows: On 9th April 1925, the District Judge of Poona on the application of the Collector of the district, passed an order under S. 10 (1) (a) of the Act for the temporary custody and protection of the property of the Sardar, as he was heavily involved in debts and was therefore unable to manage his property. The actual order was,

> the Court of Wards may take into its possession the property of the said Sardar . . . and assume its superintendence until further orders.

As it would be seen hereafter, the order goes beyond the terms of S. 10 (1) (a). On 11th April, this order was communicated to the Collector, and on the 13th the Collector reported the same to the Commissioner, who under the Act is the Court of Wards. On 22nd April the latter made the following order:

> In accordance with the authority granted by the District Judge, Poona, on 9th April 1925, the Court of Wards, Central Division, hereby assumes the temporary management of the property of Shrimant Yeshwantrao Khanderao Dabhade in the Mawal Taluka of the Poona District, and authorises the Collector of Poona to take steps for the temporary custody and protection of that property under S. 19 (2), Bombay Court of Wards Act, 1 of 1905.

This order apparently was made under the terms of S. 19 of the Act which enables the Commissioner as the Court of Wards to delegate his powers to the Collector or any other competent subordinate officer. A copy of this order was sent to the Collector apparently on the same day, and on 23rd April 1925, the Collector in his turn sent it to the Mamlatdar for taking action in accordance with the order. On 22nd April 1925, the Commissioner reported the order made by the District Judge to Government. On 24th August 1925, the District Judge made another order certifying that the Sardar was a landholder unfitted to manage his own property by reason of his improvidence and extravagant habits. This order, it is clear, was made by the District Court under S. 5 of the Act. The order was reported to the Commissioner on 31st August 1925, by the Collector, and the Commissioner in his turn, communicated the same to Government and requested Government for their sanction to the assumption of the superintendence of the property of the Sardar by the Court of Wards. Accordingly on 10th July 1926, a resolution was passed by the Government according sanction to the assumption by the Court of Wards of the superintendence of the property of the Sardar upon which the Court of Wards assumed superintendence of the property of the Sardar on 16th July 1926, and a notification to that effect was published in the Bombay Government Gazette, dated 22nd July 1926, as required by the provisions of S. 13 of the Act. It is not clear from the record whether the Government Gazette, proving that the Court of Wards had assumed superintendence of the property of the Sardar, was tendered in evidence, and as we felt some doubt on the point, we called for the original which the learned Government Pleader was good enough to produce this morning. It is clear that the burden of proving that the Court of Wards had assumed superintendence of the property of a disqualified landholder, is on those who set up that case, and they have to prove strictly that the notification as regards the assumption of the superintendence was published in the Government Gazette. As, however, the original Government Gazette is now produced, the point need not be pursued further.

These then being the material facts, the question is on what date the Court of Wards assumed superintendence of the property of the Sardar. The learned Judge held that the Court of Wards "assumed temporary superintendence on 22nd April 1925," after the District Court had authorized it to do so, and that as subsequently the Government had sanctioned the assumption of the superintendence by the Court of Wards, the Sardar became a Government ward on 22nd April 1925. With all respect to the learned Judge, I am unable to accept his conclusion or the reasoning on which he has come to this conclusion, nor has the whole of that reasoning been supported before us by the learned Government Pleader. He, however, argues that the scheme of the Act provides for two separate methods by which a Court of Wards can assume superintendence of the property of a disqualified person. The first method is under S. 4, sub-s (1), and the second is under S. 10, sub-s. (1). He further says that on the information of the man on the spot, that is the Collector it is only the District Court which can be moved in regard to all persons mentioned in S. 5, except in the case of a minor, and it is not necessary in such cases where the District Court is moved to obtain the previous sanction of Government, and that such previous sanction is only necessary in cases which fall under S. 4, sub-s. (1). The learned Government Pleader is not strictly right in saying that in all cases under S. 5, excepting the case of a minor, the declaration of the Court is all that matters. There is one more case in which also the interference of the District Court as such on the application of the Collector is not necessary and that refers to the case of a person who has been adjudged by a competent civil Court to be of unsound mind. It is therefore necessary to consider the relevant sections of the Act, and the scheme appearing therefrom.

Section 4 provides that the Court of Wards, which under S. 3 was the Commissioner, may, with the previous sanction of the Governor in Council, assume the superintendence of the property of any landholder holding lands within the local limits of its jurisdiction who is disqualified to manage his own property. "Landholder" is defined in S. 2 (*b*) and there is no dispute in this case that the Sardar was a landholder within the meaning of the Act. It follows from the terms of this section that unless there is a landholder as defined by S. 2 (*b*), and unless such landholder is disqualified to manage his own property, the section does not come into operation. The next section is S. 5 which is in these terms: "The following landholders shall for the purposes of S. 4 be deemed to be disqualified to manage their property". Then it enumerates such persons. Among them are (*c*) persons declared by the District Court, on the application of the Collector, and after such judicial inquiry as it thinks necessary, to be incapable of managing, or unfitted to manage, their own property owing to (*i*) any physical or mental defect or infirmity, or (*ii*) such habits as cause, or are likely to cause injury to their property or to the well-being of their inferior holders. I have no difficulty therefore in rejecting the learned Government Pleader's argument that S. 5 applies to a class of landholders whose property may be taken under the superintendence by the Court of Wards on the action of the District Court, different from the class of land-holders falling within S. 4 of the Act. In my opinion S. 4 must be read with S. 5, and unless the latter section is complied with, no action is possible under S. 4. Then comes S. 10, and it is in these terms:

> (*1*) Whenever the Collector receives information that any landholder ... ... is, or should be, disqualified under sub-s. (1), S. 5, or that any landholder ... ... has died and that his heir is, or should be, so disqualified, he may apply to the District Court and the District Court may authorize the Court of Wards to (*a*) take such steps and make such order for the temporary custody and protection of the property as the Court of Wards thinks fit; and (*b*) where the landholder ... ... or heir is a minor, direct that the person (if

any) having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as the Court of Wards may appoint, and make such order for the temporary custody and protection of the minor as the Court of Wards thinks fit.

Sub-section (2) provides that whenever the Court of Wards is authorized to proceed under sub-s. (1) it shall forthwith report its action for the information of the Governor in Council.

It is clear from this section that three possible cases would arise : (1) that a landholder as defined by S. 2 is disqualified under sub-s. (1), that is to say, he is already disqualified prior to the Collector seeking intervention of the Court under this section ; (2) that a landholder is to be disqualified under sub-s. (1) of S. 10; and (3) that the landholder is dead and his heir is or should be disqualified. The distinction between the first two cases is that a landholder is already disqualified within the meaning of S. 5, and the Collector thinks it necessary to move the District Court for an order under S. 10, or that the Collector proposes to apply to the District Court for an order under S. 5, but considers it necessary that before the Court of Wards assumes superintendence under S. 4 an order for the temporary custody and protection of the property should be obtained under S. 10. It is also possible that an application may seek both kinds of orders, one as to a declaration of disqualification, and the other as to temporary custody. In the present case it is clear that there were two separate orders. The one for temporary custody was made on 9th April 1925, and the other for a declaration of disqualification under S. 5 was made on 24th August 1925 (*vide* Ex. 30). It is clear therefore from the terms of the order of 9th April 1925, that the District Court had no jurisdiction to authorize the Court of Wards to assume "superintendence", nor had the Court of Wards after the receipt of the order any jurisdiction to make a declaration that it had assumed temporary superintendence of the estate of the Sardar. The Collector is not bound to act under S. 10. Obviously in cases where he thinks that there is immediate danger to the estate of a particular landholder and immediate intervention is necessary in the interest of the estate or a particular landholder or his family, the Collector is empowered to act immediately as obviously some time must elapse before Government is moved, its sanction obtained and the Court of Wards assumes superintendence after such sanction. The point to note, however, is that there is no method provided either for notifying the order for temporary custody and protection of the property, or for its publishing in any manner, nor are any means provided by which such temporary custody or even the management of the estate by the Court of Wards under an order made by the District Court under S. 10 would come to be published or brought to the notice of the public, and would put them on guard before they proceed to deal with the particular landholder.

On the other hand, as will appear presently, the Act specifically provides for proper and efficient publication of the declaration by the Court of Wards of its assumption of the superintendence, and this, in my opinion, is the most important factor which serves to distinguish the nature and importance of the two kinds of orders, viz., the mere custody of the property of a disqualified landholder and the assumption of the superintendence of his property under S. 4 (1). It again is important to notice that no sanction as such of the Governor in Council, which, according to the learned Government pleader, is the ultimate authority in such matters, is necessary before the Court of Wards assumes temporary custody of the property. All that the section provides is, that, after the Court of Wards has taken action in pursuance of the authority conferred upon it by the order of the District Court, it has forthwith to report the matter to Government, and it is clear that Government may either ask him to continue to hold temporary custody of the property or may ask him to withdraw from it. If it was intended that the assumption of the superintendence by the Court of Wards relates back to such temporary custody or the order for it, one would ordinarily expect the Legislature to say so. The next section is S. 13. S. 13, sub-s. (1), provides as follows : Whenever the Court of Wards assumes the superintendence of the property of any landholder under this Act, the fact of such assumption, and the date on which it was sanctioned by the Governor in Council, shall be notified in the Bombay Government Gazette and in such other manner as the Governor in Council may, by general or special order, direct. Sub-s. (2)

is in these terms: On and with effect from the date of such sanction the whole of the property, moveable and immovable, of such landholder, whether the existence of such property is known to the Court of Wards or not, shall be deemed to be under the superintendence of the Court of Wards. It is important to notice that the superintendence under this sub-section begins not from the declaration made by the Commissioner of the assumption of the superintendence of his property but from the previous sanction given by the Governor in Council, which must precede the actual declaration of the assumption of the superintendence by the Court of Wards. Then S. 14 which is not very relevant to the issue raised in the appeal, but which throws some light on the point, provides that on the issue of a notification under S. 13, sub-s. (1), the Court of Wards is bound to publish in the Bombay Government Gazette a notice inviting claims against the Government ward. It is significant to notice that there is not a single section in the whole of the Act which provides for what is to be done after the temporary custody is assumed. There is no provision that any claims against the Government ward are to be invited after the Court of Wards has assumed temporary custody or temporary superintendence.

I have so far dealt with the material sections and the scheme appearing from them. The scheme then as I gather from the Act appears to be as follows: A landholder defined by S. 2 has to be disqualified in the manner provided by S. 5. The Court of Wards then acts under S. 4. Obviously it may take time to move the Governor in Council to obtain the necessary sanction. The Collector or the Commissioner may consider it expedient to take immediate steps to take the property of a landholder who is disqualified or about to be disqualified under their custody, and so S. 10 provides for the requisite order to be obtained from the District Court. But taking temporary custody is not the same thing as assuming superintendence. The conditions necessary for the latter are (1) disqualification under S. 5; (2) previous sanction of Government; (3) the actual assumption by the Court of Wards or some declaration to that effect (4) notification in the Government Gazette setting out the fact of assumption and the date of the sanction. When these conditions are fulfilled, then only the property of the landholder is deemed to be under the superintendence of the Court of Wards [S. 13 (2)]. I now come to S. 37 which is the only other relevant section, but before doing so, I shall briefly refer to S. 40 which has been apparently relied upon by the learned trial Judge. In his opinion that section seems to show that the Act contemplates two sets of wards. It is enough to state that the learned Government Pleader has not even referred to the section. Apart from that, all that the section says is that the Court of Wards *may* with the sanction of the Governor in Council at any time withdraw its superintendence from the person or property or both of a Government ward, and *shall* do so if the District Court certifies that the disqualification is at an end. The reason for this distinction seems to be that in all cases of disqualified landholders the Court of Wards may consider it inexpedient to continue the superintendence or unnecessary to do so, and then move Government for sanction to withdraw from it. It is bound, however, to give up the superintendence as soon as the authority which declared that there was a disqualification certifies that it is over and it is not necessary to continue the protection given to the disqualified landholder by the Act. I now come to S. 37. S. 37 merely provides that except with the approval of the Court of Wards a Government ward shall be incompetent to transfer or create any charge on, or interest in his property, or to enter into any contract which may involve him in pecuniary liability: and "Government ward" is defined in S. 2 which says that:

> Government ward shall mean any person of whose property, or of whose person and property, the Court of Wards may, for the time being, have the superintendence under this Act.

If the section applies, the decision of the learned trial Judge is correct. In my opinion it does not apply as the promissory note in the suit was executed by the Sardar on 19th August 1925. The sanction for the assumption of the superintendence by the Court of Wards was given by the Governor in Council on 10th July 1926, and therefore under sub-s. (2), S. 13 the property of the Sardar must be deemed to be under the superintendence of the Court of Wards from that date, and he became a Government ward as and from that date. That being so, the promissory note does not fall within the prohibition imposed by S. 37. The learned Government pleader has relied upon some passages in Maxwell. But I do not think that the present case falls within the observations in those passages. Here it is not a question of explaining a mere word or changing the order of words in a sentence. If the respondent's argument is to be accepted, the Act will have to be re-cast in more than one place. It would be necessary to alter again the terms of S. 13. The tendency of modern decisions, as Maxwell points out, is upon the whole to narrow the difference between what is called a strict interpretation and what is called a beneficial interpretation. It is a well established cannon of construction that every statute is to be expounded according to its express and manifest intention, and that all cases within the mischief aimed at are, if the language permits, to be held to fall within its remedial influence : (1844) 11 Cl & F 85[1] at p. 143 and (1826) 4 L J K B (O S) 207.[2] Statutes which encroach on the rights of the subject whether as regards person or property are subject to a strict construction in this sense, and it is a recognized rule that they should be interpreted if possible so as to respect such rights. As Brett, M. R. observed in (1884) 14 Q B D 245[3] at p. 259 :

> It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring a person's rights without compensation, unless one is obliged so to construe it.

I am satisfied that I am not obliged to construe S. 10 as the respondent desires, and I cannot accept the argument that otherwise it would be a dead letter. After all, the Collector is not bound to act under S. 10 in every case though it may be necessary to proceed under Ss. 4 and 5. It is easy to conceive of many cases where the Court of Wards has assumed temporary custody, yet nothing has happened to the detriment of the estate before the sanction of the Governor in Council to the assumption of superintendence of the estate. Because in some cases, as in this, such consequences may take place, it cannot be said that the construction I am placing upon the Act would reduce S. 10 to a dead letter. The Act is an Act which infringes upon the ordinary rights of the citizens, and apart from the rules of construction which I have pointed out, it gives very wide privileges to the landholders, as defined in S. 2, to the prejudice of the ordinary citizens. In my opinion there is no reason in this case, unless the Legislature had compelled me, to extend its scope further. I would, therefore, allow the appeal and decree the plaintiffs' claim with costs throughout. After I delivered my judgment on this point, the Government Pleader stated that there was a question of limitation in the case. When he finished his argument, it was open to him to raise the point, but he clearly did not do so. Apart from that, it seems to me that there is no substance in that point. The point was decided against the defendant by the learned Judge on the strength of a decision of this Court in 22 Bom L R 943.[4] The Plearned Government leader concedes that if that decision stands, then the decision of the learned Judge on that point cannot be interfered with. We are bound by that decision and reject the contention now raised. That being so, there must be a decree in favour of the plaintiff for Rs. 6,095 up to the date of the suit, and further interest on the principal amount at six per cent. from the date of the suit till judgment, with costs throughout, and further interest on judgment at six per cent. till payment.

Tyabji, J.—I am of the same opinion. The suit is based on a promissory note. The defence is that when the defendant executed the promissory note he was a Government ward, i. e., a person of whose property the Court of Wards had for the time being the superintendence, under the Bombay Court of Wards Act (Bom. 1 of 1905), S. 2 (a) ; and that therefore under S. 37 of the Act he was incompetent except with the approval of the Court of Wards (which had not been obtained) to enter into any contract which may involve him in pecuniary liability. The learned Judge has upheld the defence. The question depends upon the date from which the defendant must be deemed to be a Government ward. The relevant facts are very few : (1) on 22nd April 1925, the Commissioner acting as the Court of Wards passed the following order: "In accordance with the authority granted by

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1. The Sussex Peerage, (1844) 11 Cl & F 85 = 8 E R 1034=8 Jur 793=65 R R 11.
2. Fennel v. Riddler, (1826) 4 L J K B (O S) 207 =5 B & C 406=8 D & R 204=29 R R 278.
3. Attorney-General v. Horner, (1884) 14 Q B D 245=54 L J Q B 227=33 W R 93=49 J P 326.
4. Shivajirao v. Hari, A I R 1920 Bom 137 = 58 I C 319=22 Bom L R 943=44 Bom 871.

the District Judge, Poona, on 9th April 1925" under S. 10 (1) (a), "the Court of Wards, Central Division, hereby assumes the temporary management of the property of Shrimant Yeshwantrao Khanderao Dabhade," i. e., the defendant in the Mawal Taluka of the Poona District, and authorizes the Collector of Poona to take steps for the temporary custody and protection of that property, under S. 19 (2), Bombay Court of Wards Act of 1905. (2) On 19th August 1925 the defendant executed the promissory note sued upon. (3) On 24th August 1925 the District Judge, Poona, by an order of that date, certified that the defendant was a landholder unfitted to manage his own property by reason of his improvidence and extravagant habits: Court of Wards Act, S. 5 (1) (c). (4) On 12th July 1926 the Governor in Council sanctioned the assumption of the superintendence of the defendant's property. The learned Judge has held that the defendant became a Government ward from 22nd April 1925 when the Commissioner assumed under S. 10 (1) (a) what has been called temporary superintendence. The Government Pleader who appears for the respondent admits that unless the Court of Wards has under its superintendence for the time being, the property of any person, there cannot be a Government ward as defined in S. 2 (a); and that S. 10 (1) (a) does not empower the District Court to authorize the assumption by the Court of Wards of the superintendence of any property: but only to take steps and make orders for the temporary custody and protection of the property. The Government Pleader however argues that the clause in S. 10 must be so read as to give some efficacy to the Act: and that the whole purpose of the Act would be frustrated, unless the clause is so interpreted as to empower the District Court to authorize what must have the same effect as assumption of superintendence of the property under the Act: and what must have the effect of making the person whose property is taken under temporary custody a Government ward, and of subjecting his contracts to S. 37.

It is therefore necessary to consider the scheme and purpose of the Act. The preamble to the Act recites that it is expedient to establish a Court of Wards in the Bombay Presidency. That purpose is fulfilled by the first operative section—S. 3—which provides that the Commissioner shall be the Court of Wards. The rest of the Act lays down the functions and duties to be performed by the Court of Wards, and defines over what persons and property it shall have authority, and in what manner its authority shall be exercisable. The function of the Court of Wards appears from S. 4 to be to assume superintendence of the property or the person and property of disqualified landholders. Under that section this function may be exercised—i.e., superintendence may be assumed—on two conditions being satisfied: first, previous sanction of the Governor in Council being obtained, and, secondly, the landholder being disqualified to manage his own property.

The first mentioned condition, viz., the previous sanction of the Governor in Council to assume superintendence, is further referred to in the proviso to S. 4 and in S. 13, which latter section requires the assumption of the superintendence under the Act to be publicly notified. I shall refer to S. 13 later. The condition secondly mentioned in S. 4 as necessary to be fulfilled, before the Court of Wards can exercise its function of assuming superintendence, is that the landholder shall be disqualified to manage his own property. This condition, though it is mentioned in the second place, must in the nature of things be fulfilled before the sanction of the Governor in Council can be obtained. Which landholders shall be deemed to be so disqualified is laid down in general terms in S. 5. Ss. 6, 7, 8, 9, 11 and 12 deal more particularly with special cases or circumstances in connexion with this condition. Of these, S. 9 provides that a landholder may himself apply in writing to the Governor in Council to have his property placed under the superintendence of the Court of Wards. In that case the Governor in Council may, on being satisfied as to the two matters stated in S. 9, order the Court of Wards to assume superintendence. This section may be taken as a special form of both the conditions to assumption of superintendence being fulfilled: (a) the landholder is deemed to be disqualified by his own application, and (b) the sanction of the Governor in Council is included in his order. After these conditions for the assumption of superintendence by the Court of Wards are satisfied, S. 13 follows, which, as I have already stated, requires that the fact of the assumption and the date of the sanction of the Governor in Council shall be publicly notified. It also lays down the significant provision that on and with effect from the date of the sanction, the property shall be deemed to be under superintendence. This completes the part of the Act (Ss. 4-13) containing the procedure through which the Court of Wards is clothed with the authority to assume superintendence.

I have not so far had to refer to S. 10. And yet that is the section from which the assumption of temporary superintendence is said to be derived. It is argued that this section empowers the District Court to make an order placing the Court of Wards in the same position in which the Court of Wards is placed when it assumes superintendence in accordance with Ss. 4, 5 and 13. Under the terms of S. 10 the District Court may authorize the Court of Wards to take steps for the temporary custody and protection of the property. I will for the present merely refer to the marked difference between the language of S. 10 and of the sections dealing with the assumption of superintendence. The words "temporary custody and protection" seem to occur nowhere else in the Act; and nowhere else is the "assumption of superintendence by the Court of Wards" referred to in any other language. The Act then proceeds to what may be called its second part. The Court of Wards having been duly authorized to assume superintendence and superintendence having been assumed and notified in accordance with S. 13 so as to give the fact wide publicity, the Court of Wards may exercise the power and authority conferred upon it by the succeeding sections.

This power and authority fall under two heads: first, the Court of Wards may deal with claims against the Government ward: Ss. 14-18. For this purpose S. 14 requires a public notice calling upon all persons having claims against the Government ward or his property to submit the same in writing. The next following sections provide for such claims being investigated and dealt with. The second head of the functions and powers of the Court of Wards (Ss. 19-38) refers to the management of the property under superintendence—apart from dealing with the claims existing at the time of assuming superintendence. The Court of Wards may do all such things as the owner of the property might do for its proper care and management (S. 23). It may (with the sanction of the Governor in Council) sell, exchange and mortgage the property of the ward (S. 27). These are powers that originally vested in the Government ward. It must follow as a corollary from the transfer of these powers to the Court of Wards that they must be taken away from the ward. Having been conferred upon the Court of Wards, they cannot any more be exercisable by the ward himself. It is in this connection that S. 37 is enacted. On the one hand, the Court of Wards is empowered to manage the property and deal with it as the owner, and on the other, the authority of the original owner to deal with it is taken away. It is obvious that the powers conferred upon the Court of Wards would be futile unless the ward were rendered incompetent to transfer or mortgage the property or to enter into contracts involving him in pecuniary liability. This is what S. 37 does. S. 37 complements the transfer of authority resulting from the assumption of superintendence by the Court of Wards. S. 39 refers to the case of a Government ward dying: the Court of Wards is not authorized to retain the superintendence of the property without the sanction of the Governor in Council.

Then follow provisions mainly with regard to the withdrawal of the superintendence. For withdrawal also, the sanction of the Governor in Council and notification of the fact are necessary. The learned Judge has misunderstood the significance of the provisions for withdrawal of superintendence. They fall under different heads corresponding to the different ways in which the superintendence may initially be assumed. The case is the simplest, where on the application of the land-holder himself, under S. 9, the Court of Wards has been ordered to assume superintendence: S. 40 (1) deals with this case. In other cases the assumption of superintendence rests on two foundations: (1) the sanction of the Governor in Council, (2) the land-holder being disqualified: S. 40 (2) deals with each of these conditions. The superintendence may end by either condition being removed: (1) the Governor in Council may authorize withdrawal of superintendence, (2) the District Court may certify that the land-holder is no more disqualified. S. 44 seems also to have been misapprehended by the learned Judge. It merely provides for supervision and control by the Governor in Council over matters not dealt with by the District Court. The District Court's orders, as the orders of a civil Court, are already subject to appeal or revision. The learned Judge has dealt with the case on a footing that is not supported before us. He seems to have overlooked that superintendence cannot be assumed under S. 4 unless two necessary conditions are satisfied: (1) the sanction of the Governor in Council, and (2) the land-holder being held to be disqualified to manage his own affairs. The learned Judge has proceeded on the basis that since the District Court may in certain cases by its declaration put an end to the disqualification on the part of a Government ward to manage his own affairs: and since by putting an end to the disqualification, the District Court may consequentially put an end to the period of superintendence: therefore it must follow that even without declaring a land-holder to be disqualified, the District Court can give itself jurisdiction to sanction assumption of superintendence by the Court of Wards—a power that the Act reserves to the Governor in Council.

The powers conferred upon the District Court under S. 10 provide for cases where neither of the two conditions precedent may exist, viz., where the ward has not been declared disqualified to manage his own affairs, and prior sanction to the assumption of the superintendence of the ward's property has not been obtained. It provides for the preliminary stage where the land-holder may not even have been declared to be disqualified. The temporary custody and protection of the property is provided for, until after the land-holder having been declared to be disqualified, the sanction of the Govenor in Council is obtained. The scheme of the Act is clear. The first part of the Act provides that authority to assume superintendence may be derived only when there is a disqualified land-holder and when the sanction of the Governor in Council has been obtained. The second part provides for the exercise of the authority to superintend under two heads: dealing with existing claims against the ward, and managing the property as if the Court of Wards were the owner. The third part deals with the withdrawal of superintendence. The two sections on which the decision of the case depends are S. 10 and S. 37, which are contained respectively in what I have referred to as the first and the second parts of the Act. I need not again emphasize the difference between the terms of S. 10 which gives powers to the District Court to authorize the Court of Wards to take steps and make orders for the temporary custody and protection of the property, and the terms of Ss. 4, 6, 11, 13, 19, 27, 39, 40 and 44, all of which indicate that the sanction of the Governor in Council and notification of that fact are necessary for the assumption or withdrawal of superintendence.

The argument for the respondent requires the eyes to be closed upon the care with which on each occasion that superintendence or its withdrawal is authorized, the sanction of the Governor in Council has been insisted upon; and upon the fact that the authority given to the District Court under S. 10 may be exercised by it even in the case of a land-holder who is not disqualified at the time when the District Court makes the order. Moreover under S. 37 a person otherwise *sui juris* suffers a reduction of status and is made incompetent to contract. This affects the rights not only of the person directly concerned. The public are obviously interested in being warned against entering into contracts which are rendered unenforceable. This position is sought by the argument to be brought about, without the safeguard of the sanction of the Governor in Council, and without notification or publicity. The order for the temporary custody and protection of the property under S. 10 is not linked up with the scheme of the Act for assumption of superintendence; whereas S. 37 is a necessary corollary of the assumption of superintendence. The learned Officiating Chief Justice has pointed out that the District Court's order dated 9th April 1925, was inaccurate in form and unauthorized, in so far as it purported to direct the Court of Wards not only to take temporary custody of the property but to assume its superintendence until further orders. It was evidently not realized that the expression "assumption of superintendence" has the special meaning that the Court of Wards Act gives to it: it connotes two main functions: (1) calling upon all persons having claims against the Government ward to submit them and thereafter to deal with the claims, and (2) doing all such things requisite for the proper care and management as the owner might do.

It is difficult to see how the exercise of either of these two functions can be deemed to be steps or orders which the Court of Wards may think fit to take or issue, for the temporary custody and protection of the property. S. 10 seems to contemplate an application by the Court of Wards to the District Court particularizing the steps and orders that the Court of Wards thinks proper, for the temporary custody and protection, and the District Court thereupon authorizing those steps to be taken. It is necessary that the exact limits of the jurisdiction conferred by S. 10 should be borne in mind, so that it may be exercised by the District Court precisely in the manner in which the Act requires it to be exercised. To give to an order under S. 10 (1) (a) the effect for which the Act requires compliance with Ss. 4, 5, 13 and 14, would, in my opinion, not be giving efficacy to the Act but setting the Act at nought. In the result I am of opinion that the District Court is not authorized by S. 10 to provide for the assumption of the superintendence of any property in the sense in which that expression is used in the Bombay Court of Wards Act, 1905; and that the order under S. 10 did not attract S. 37, nor has the effect of rendering the defendant incompetent to enter into contracts involving him in pecuniary liability. The defence, therefore, to the suit on the promissory note fails. I agree in the order proposed by the learned Officiating Chief Justice.

K.B./A.L. *Appeal allowed.*

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* A. I. R. 1937 Bombay 275

FULL BENCH

BARLEE, N. J. WADIA AND MACKLIN, JJ.

Govind Sripad Lokhande and *others* — Defendants — Appellants.

v.

Shrinivas Krishna Hebbali and *others* — Plaintiffs — Respondents.

First Appeal No. 259 of 1931, Decided on 23rd December 1936, from decision of First Class Sub-Judge, Dharwar, in Special Civil Suit No. 103 of 1930.

*** (a) Civil P. C. (1908), S. 92—Government notification empowering Mr. H, First Class Sub-Judge, Dharwar, to hear suits instituted under S. 92 — Notification held did not empower Mr. H as persona designata but empowered Court of First Class Sub-Judge, Dharwar, presided over by Mr. H within meaning of S. 92 (1), even to entertain plaints.**

The Government of Bombay purporting to act under S. 92, Civil P. C., empowered one Mr. H, First Class Subordinate Judge, Dharwar, to hear suits which might be instituted under S. 92. It was contended that the notification did not comply with S. 92 firstly because under the notice Mr. H was a persona designata and secondly the notification did not empower the Court to entertain plaints:

Held: that the notification did not empower Mr. H as a persona designata but duly empowered the Court of the First Class Subordinate Judge, Dharwar, presided over by Mr. H within the meaning of S. 92 (1). It was not necessary for the notification to mention the power to entertain plaints, for that power was included in the general grant of jurisdiction: *21 Bom 279* and *39 Cal 146, Disting.*; *Obiter of Beaumont, C. J. in A I R 1935 Bom 172, Dissent.* [P 279 C 1]

(b) Interpretation of Statutes — Duty of Court.

It is the duty of a Court in interpreting statutes to attempt to find the intention of the Legislature, and, if possible, to give effect to that intention. The more literal construction ought not to prevail, if it is opposed to the intentions of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated: *Caledonian Rly. Co.* v. *North British Rly. Co.*, *(1881) 6 A C 114, Rel. on.* [P 278 C 1, 2]

G. P. Murdeshwar — for Appellants.

A. G. Desai and *S. B. Jathar* — for Respondents.

Order of Reference.

Broomfield, J.—This is an appeal from a decree of Mr. V. B. Halbhavi, First Class Subordinate Judge, Dharwar, in a suit under S. 92, Civil P. C. A preliminary objection has been taken on behalf of the appellants that the Judge had no jurisdiction to try the suit. The point arises in this way. S. 92 provides that suits of the nature dealt with in the section may be instituted in the principal civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate. By a notification dated 10th March 1930, Government empowered

> Mr. V. B. Halbhavi, First Class Subordinate Judge, Dharwar, to hear suits which may be instituted for any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust.

The plaint in this suit was filed in the Court of the First Class Subordinate

Judge, Dharwar, on 21st August 1930. It is argued that the notification does not satisfy the requirements of the statute and that the empowering of an individual Judge to hear suits of a certain class which may be instituted has not the effect of making the Court over which that Judge presides a Court duly empowered in that behalf within the meaning of S. 92 so that a suit may be lawfully instituted there. The principal support for this argument and in all probability the genesis of it are to be found in certain observations of the learned Chief Justice in 59 Bom 412.[1] The point to be decided there was whether a District Judge had power to transfer a suit under S. 92 which had been instituted in his Court to be heard by a Subordinate Judge who subsequently to the institution of the suit had been empowered by a notification similar to that in the present case. It was held that the transfer was illegal. One of the grounds of the decision was that the words "suits which may be instituted" in the notification could not possibly apply retrospectively to a suit instituted before the notification and that therefore the Subordinate Judge was not empowered to try the suit. That was the only ground on which Divatia, J. based his decision. But the learned Chief Justice expressed the view that the notification was ultra vires. He said (p. 415):

> Section 92 authorizes the Local Government to empower the institution of a suit falling within S. 92 in the Court of the First Class Subordinate Judge of Nadiad, if the whole or any part of the subject-matter is situate within the local limits of that Court's jurisdiction. But when one looks at the language of the notification which exercises the authority, it bears in its operative part no relationship to the language of S. 92 which creates the authority. The notification does not deal with the institution of suits; it deals with the hearing of suits which may be instituted; nor is there any limit in the notification upon the local jurisdiction of Mr. Desai, who is empowered to hear the suits. If the notification is construed literally, it authorizes or purports to authorize Mr. Desai to hear any suit falling within S. 92 which may be instituted, which must mean properly instituted, in any place. My own view is that the notification does not deal, as it should, with the institution of suits, but merely with the hearing of suits properly instituted, and is ultra vires and has no effect under S. 92.

It was not essential to go as far as that for the purpose of that case, as indeed the learned Chief Justice said, and, as Divatia, J. did not express agreement with the view that the notification was ultra vires and ineffectual, learned counsel for the appellants cannot and does not contend that there is a decision on the point which binds this Court. But he says, quite properly, that if the reasoning of the learned Chief Justice is sound, we must accept it and follow it in the present case. We think, however, that there may be other points deserving of consideration in this connexion which it was not necessary to go into in *Dhoribhai's case*.[1] The gist of the argument of the learned counsel for the respondents is that power to hear suits of a specified class includes the power to receive or entertain such suits. Now obviously that cannot be laid down as a proposition universally correct. Some suits and applications which are by law required to be instituted in a particular Court may be transferred for hearing to another Court and in that case the latter Court, though empowered to hear, is not empowered to receive and entertain. But generally speaking it is true that if a presiding Judge of a Court is empowered to hear suits of a particular description such suits may be instituted in his Court. The institution of a suit is in a sense a purely formal matter. It means the handing of the plaint to a clerk of the Court. A layman therefore might perhaps suppose that, as the matter of most importance is the jurisdiction to hear and decide the case, the conferment of jurisdiction to hear such cases carries with it jurisdiction over the formal preliminaries. The notification purports to be issued in exercise of the powers under S. 92 (1). It is reasonable, I think to assume that Government intended to comply with the statute and to confer the necessary powers on the Court over which Mr. Halbhavi presided and presides. It was never suggested at the hearing of the suit that the intention of Government could have been otherwise. As the learned Chief Justice pointed out in the case cited, the language used in the notification is most inappropriate for the purpose suggested. But it is one thing to say that the language is inappropriate and another to say that it is incapable of bearing the meaning which Government, as I see no reason to doubt, intended it to have. Although it is

> **a golden rule of drafting that where an Act of Parliament or other instrument confers power to**

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[1] Dhoribhai v. Pragdasji, A I R 1935 Bom 172 =157 I C 1086=59 Bom 412=37 Bom L R 120.

authorize some act, the instrument which exercises the power should be expressed in language following as far as possible the language of the Act or instrument which creates the power,

there is no legally prescribed form of words for the conferment of the power in question. It would be unfortunate and unsatisfactory in the extreme if we were forced to hold that the First Class Subordinate Judge had no jurisdiction. The result would be that the plaint in this suit which was instituted more than six years ago would have to be returned. The whole of the proceedings, labour, time and expense would go for nothing, and after amending the form of the notification the whole process would have to be commenced afresh. We are informed that there are other cases of the same kind pending which would be affected in the same way. It is possible that a large number of cases might be affected both pending and decided. It is therefore a matter of considerable public importance. We think the law point involved is by no means free from difficulty even after the decision in *Dhoribhai* v. *Pragdasji.*[1] We think it desirable therefore to refer to a Full Bench the following question: Whether by virtue of a Notification in this form, "In exercise of the powers conferred by sub-s. (1), S. 92, Civil P. C., (1908), (5 of 1908), the Governor in Council is pleased to empower Mr. V. B. Helbhavi, First Class Subordinate Judge, Dharwar, to hear suits which may be instituted for any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust", the Court of the First Class Subordinate Judge, Dharwar, presided over by Mr. V. B. Halbhavi, was a Court duly empowered in that behalf within the meaning of S. 92 (1)."

Wassoodew, J.—S. 92 (1), Civil P. C., proposes to give new jurisdiction to the existing Courts in a particular mode to deal with a new matter. That mode has been clearly indicated according to which the Local Government is invested with authority to empower the Courts with the new jurisdiction. Therefore it must be expected that the authority of the Local Government would be exercised in conformity with the direction of the statute. That the notification in question does not strictly follow the language of S. 92 (1), cannot be doubted. If the phrase "to hear suits" in the notification is used in a technical sense, it will not necessarily confer the power to receive suits which may be instituted in the empowered Court. The language of the notification in my view is susceptible of the construction that the Subordinate Judge is empowered to hear suits which may be instituted in another Court. The difficulty is whether the notification can be understood to intend to confer jurisdiction on the Court under S. 92 (1) to receive suits which may be instituted in that Court when it has expressly empowered that Court to hear suits of the description mentioned in that section. Undoubtedly the Government have purported to act under the powers conferred by S. 92 (1). But they have left it for implication as to what jurisdiction they intended to confer. The question is how far the doctrine of implication can be extended to this case. The matter is of general importance and likely to affect the validity of decrees passed in similar suits in other Courts which have been similarly empowered. I therefore agree that it is desirable that the question should be referred to the decision of a Full Bench in the form in which it is formulated.

Opinion.

Barlee, J.—This case has been referred to a Full Bench, and the question referred is in these terms:

> Whether by virtue of a Notification in this form, "In exercise of the powers conferred by sub-s. (1) of S. 92, Civil P. C., 1908 (5 of 1908), the Governor in Council is pleased to empower Mr. V. B. Halbhavi, First Class Subordinate Judge, Dharwar, to hear suits which may be instituted for any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust", the Court of the First Class Subordinate Judge, Dharwar, presided over by Mr. V. B. Halbhavi, was a Court duly empowered in that behalf within the meaning of S. 92 (1).

Similar notifications have been a subject of enquiry in this Court already. Divatia, J., in *Civil Revn. Appln. No. 244 of 1934*,[2] held that a notification in the same terms was legal and intra vires, and empowered the Court of the Subordinate Judge therein named to exercise jurisdiction under S. 92, Civil P. C. The question was again considered in an appeal heard by his Lordship the Chief Justice and Divatia, J., in 59 Bom 412.[1] The question was not there decided, but the learned Chief Justice expressed an opinion obiter that the notification then in suit, which was in the same terms as that we have to consider was ultra vires and had no effect under S. 92. Accordingly, when the question came up for decision for a third time in the present appeal, Broomfield and Wassoodew, JJ., referred the matter to a Full Bench. S. 92, Civil P. C. provides :

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[2] Bhimaji Bhagwanji v. Gomaji Motiji, Civil Revn. Appln. No. 244 of 1934, decided on 13th August 1934 by Divatia, J.

> In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General. . . . may institute a suit. . . . . in the principal civil Court of original jurisdiction or in other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate. . . .

The Government of Bombay, purporting to act under this section, issued the notification in suit which empowered Mr. V. B. Halbhavi, First Class Subordinate Judge, Dharwar, to hear suits which may be instituted under S. 92, and it is contended that this notification is not in conformity with the terms of the section and does not empower the Court of the First Class Subordinate Judge, Dharwar, to hear suits within the section. Mr. Murdeshwar contends that under the notification Mr. Halbhavi was a persona designata, and that the notification therefore did not comply with the section. It appears to us that the notification can be interpreted in two ways. The words 'First Class Subordinate Judge of Dharwar,' following Mr. Halbhavi's name, may be looked upon as words of description in which case as Mr. Murdeshwar contends, the notification would not comply with S. 92. But this is not the only way in which it can be interpreted. The words, we think, can mean 'Mr. V. B. Halbhavi, in his judicial capacity as Judge of the First Class Court of Dharwar', and that in our opinion is as much to say that the First Class Court presided over by Mr. Halbhavi was empowered under the section. If we are right, then we are entitled if not bound to adopt the latter interpretation. It is the duty of a Court in interpreting statutes and other documents of like nature to attempt to find the intention of the author, and if possible to give effect to that intention as stated in (1881) 6 A C 114[3] viz. (p. 122) :

> The more literal construction ought not to prevail, if (as the Court below has thought) it is opposed to the intentions of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

The intention of Government was we think clear. In the words of Broomfield, J. :

> It is reasonable to assume that Government intended to comply with the statute and to confer the necessary powers on the Court over which Mr. Halbhavi presided and presides.

Against this view Mr. Murdeshwar urges that it must have been the intention of Government to confer a personal jurisdiction on Mr. Halbhavi since it must end with his transfer or be taken by him to another Court. But again, another and more liberal view is possible—that the jurisdiction was given to the Court so long as it was presided over by Mr. Halbhavi, in other words that the jurisdiction was restricted in time. We see no objection to such a restriction or to accepting that view. We have been referred by the learned advocate to two cases in support of his argument. 21 Bom 279[4] decides that a District Judge when trying election petitions under S. 23, Bombay District Municipal Act is a persona designata and not a Court; and on this analogy Mr. Murdeshwar argues that Mr. Halbhavi was a persona designata. This case does not take us very far, for we cannot interpret the notification by itself, but must read it with S. 92. In 39 Cal 146[5] it was held that a notification under S. 92 directed to a particular Judge, and purporting to deal with a particular litigation which was already pending in the Court of a District Judge was ultra vires. Our case however is distinguishable if we asssume, as we have done, that it was the intention of Government to empower Mr. Halbhavi to try cases instituted under S. 92 in his own Court. The next objection is that the section deals with the institution of suits and to conform with it, the notification should have empowered the Court to entertain plaints. This is a formal objection, and in our opinion it disappears when the section is analyzed and interpreted in accordance with the general plan of the Code. The first part confers on the Advocate-General the right to institute suits directly or through persons nominated by him. The second part indicates the Courts which have jurisdiction. It restricts the jurisdiction of Courts inferior to a District Court which would otherwise have had jurisdiction under the various Acts which confer jurisdiction; and it authorizes a Local Government to empower a Court to exercise jurisdiction in such suits, that is to say a Local Government may restore jurisdiction. In our opinion it was not necessary for the notification to mention the power to entertain plaints, for that power is included in the general grant of jurisdiction, and is nowhere expressly mentioned in the Code. S. 26 provides that a suit shall be instituted by the presentation of a plaint: O. 6, R. 1, that a plaint shall be presented to the Court or such officer as it appoints; and O. 7, which deals with plaints, contains rules for their return or rejection but not for acceptance. In fact the Civil Procedure Code unlike the Criminal Procedure Code lays no stress on acceptance, which is looked on as a semi-ministerial act.

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[3] Caledonian Railway Co. v. North British Railway Co., (1881) 6 A C 114=29 W R 685.

[4] Balaji Sakharam v. Merwanji Nowroji, (1895) 21 Bom 279.

[5] Abdul Karim Abu Ahmed Khan v. Abdus Sobhan Chowdhry, (1911) 39 Cal 146=13 I C 243=16 C W N 44.

The next objection put forward by the learned advocate is that the notification is bad inasmuch as the limits of the jurisdiction of the First Class Subordinate Judge are not indicated. This objection however does not survive, now that we have come to the conclusion that the Government intended to give and that the words used are capable of giving jurisdiction to the Court of the First Class Subordinate Judge at Dharwar, since it follows that the limits of the Court's jurisdiction for the purposes of suits under this section must be the same as those for ordinary suits. Our answer, then to the question before us is that the Court of the First Class Subordinate Judge presided over by Mr. Halbhavi was a Court duly empowered in that behalf within the meaning of S. 92 (1).

N. J. Wadia, J.—I agree, and have no remarks to offer.

Macklin, J.—I agree, and have nothing to add.

D.S./R.K. *Answer accordingly.*

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* * A. I. R. 1937 Bombay 279

FULL BENCH

BEAUMONT, C. J., RANGNEKAR AND N. J. WADIA, JJ.

Balu Sakharam Powar—Defendant 1—Appellant.

v.

Lahoo Sambhaji Tetgura—Plaintiff—Respondent.

Second Appeal No. 279 of 1933, Decided on 16th October 1936, from decision of Dist. Judge, Thana, in Appeal No. 196 of 1931.

* **(a) Hindu Law—Adoption—Bombay Presidency—Widow's right to adopt—Nature of—Effects of such adoption—Principles deduced from case law stated.**

(Per *Beaumont, C. J.* and *N. J. Wadia, J.*)—(1) A widow of a deceased member of a Hindu joint family can adopt to her husband without obtaining the consent of her husband's relations. (2) A Hindu widow's right to adopt is based on religious considerations, and is not affected by any consideration as to the vesting or divesting of property. (3) Where a coparcenary exists at the date of the adoption the adopted son becomes a member of the coparcenary, and takes his share in the joint property accordingly and this principle applies although the coparcenary is a zamindari having the peculiar feature of being governed by the rule of lineal primogeniture. (4) Where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her: *Case law reviewed.* [P 284 C 2]

(Per *Rangnekar, J.*)—(1) Where the family is joint and undivided, a widow of a coparcener can make a valid adoption to her deceased husband without the consent of the surviving coparceners, unless she was prohibited either expressly or impliedly by her husband from making an adoption and unless her power is at an end. (2) A widow of a separated Hindu can always make a valid adoption to her husband unless prohibited expressly or impliedly by her husband and unless her power to adopt is at an end. (3) Where the coparcenary is extinct and the estate of the last surviving coparcener has passed by inheritance to his heir, the power of a widow of a pre-deceased coparcener to adopt a son to her husband is at an end and she cannot make a valid adoption to her deceased husband. (4) There are limits to the exercise of the power of a widow to adopt a son to her husband, and when those limits are reached, the power is at an end and can never be revived. (5) Succession can never be in abeyance except in the case of a widow in a joint family who is *en ceinte* at the time of the death of the last coparcener. The nearest heir succeeds as beneficial owner and becomes a fresh stock of descent, except in the case of those widows who take a widow's estate only. (6) If the adoption is valid, it is valid for all purposes, and the adopted son has all the rights of a posthumous son. (7) Religious efficacy is not the sole test of the validity of adoption by a Hindu widow. In determining the validity of adoption other considerations also come in from the point of view of rights to property and they have also to be considered. The rule of religious benefit has even its limits and once the power to adopt has come to an end it cannot be revived and any adoption made subsequently is invalid : *Case law discussed.* [P 304 C 2]

** **(b) Hindu Law — Adoption — Coparcenary—Extinction of coparcenary by death of last surviving coparcener—Family property vesting in his heir—Subsequent adoption by widow of other deceased coparcener—Adoption whether valid — Adoption does not revive coparcenary—Adoption does not vest property in adopted son by divesting heir of property already vested in him.** (Per *Beaumont, C. J.* and *N. J. Wadia, J.*; *Rangnekar, J.*, contra.)

(Per *Beaumont, C. J.* and *N. J. Wadia, J.*)—Where on the death of the last surviving coparcener, the coparcenary ceases to exist and the family property vests in the heir of such coparcener, and subsequently the widow of the other deceased coparcener adopts, the adoption is valid, but it does not revive the coparcenary, does not vest the property in the adopted son to the exclusion of such heir and does not divest such heir of the property already vested in him : *A I R 1935 Bom 182, Dissent.*; *A I R 1935 Bom 427* and *A I R 1936 Bom 132, Approved* ; *A I R 1936 Bom 135, Not approved* ; *14 Bom 463, Not overruled by subsequent Privy Council decisions.* [P 284 C 2; P 285 C 1]

(Per *Rangnekar, J.*) — Such an adoption is invalid as the widow's power to adopt has already come to an end. The question whether the adoption has the effect of divesting the heir of the property already vested in him, does not arise as the adoption is itself invalid : *A I R 1935 Bom 182, Rel. on*; *A I R 1935 Bom 427* ; *A I R 1936 Bom 132* and *A I R 1936 Bom 135, Dissent.*; *14 Bom 463, Not overruled by later Privy Council decisions and still good law.* [P 304 C 1, 2]

(c) Practice—Duty of Court—Long course of judicial decisions giving rise to rights in property for long time—Court should hesitate before upsetting such decisions.

(Per *Rangnekar, J.*)—A Court of law ought to hesitate before upsetting a long course of judicial decisions and particularly where on the faith of such decisions rights of the subjects have for a long time come into existence and dispositions of property have been made and entered into : *Julius* v. *Lord Bishop of Oxford*, *(1880) 5 A C 214* and *The 'Blairmore'*, *(1898) A C 593, Rel. on.* [P 285 C 2; P 286 C 1]

P. V. Kane and *K. N. Dharap* — for Appellant.

V. B. Virkar — for Respondent.

Beaumont, C. J.—In this second appeal certain questions have been referred by a Bench consisting of Divatia and Macklin, JJ., to a Full Bench. The justification for the reference is the doubt which exists as to how far recent decisions of the Privy Council have affected the law of adoption in this Presidency. The question is of great importance since questions relating to adoption form one of the most fruitful sources of litigation, and we are told that a good many pending appeals depend on the answers this Bench may make to the questions referred.

In dealing with the law of adoption two aspects of the matter have to be borne in mind, first, the right to adopt, and secondly, the effect of a valid adoption upon the vesting or divesting of property. In my opinion, there can be no doubt that recent decisions of the Privy Council, to which reference will be made hereafter, have greatly extended the rights, as formerly understood in this Presidency, of a Hindu widow to adopt, and have established that the right depends on considerations of a religious character, and forms part of the religious system of the Hindu community. The effect of adoption upon the vesting and divesting of property is, however, part of the law of property, and the question which we have to consider is the effect of the Privy Council decisions upon that branch of the law. In considering that matter, those responsible for the practical administration of the law in this Presidency cannot shut their eyes to certain general considerations. In the first place, although the right of a Hindu widow to adopt may be based on considerations of religion and the paramount obligation of providing a son to her deceased husband, so that there may be some one to perform the religious rites for the benefit of the souls of his ancestors, in actual practice the very numerous cases of adoption which come before the Courts are all concerned with questions of property. Whether the widow of a pauper Hindu ever adopts, I know not. She would probably find it difficult to persuade any man to give himself or his son in adoption if he were offered nothing more tangible, in exchange for the position which he gives up in his own family, than the prospect of performing religious ceremonies for the benefit of the souls of ancestors in the adoptive father's family. At any rate, if adoptions are ever made in families which possess no property, they are not challenged in the Courts. In the second place, the widow of a Hindu is frequently a girl of tender age, who may survive her husband by 50 or 60 years, and self-interest suggests to a widow that she should postpone an adoption till near the close of her life in order that she may not herself be deprived of the enjoyment of her property. I do not suggest that this motive always operates, since, apart from a sense of duty which a Hindu widow may possess, she is usually subjected to much advice of an interested, and often dishonest character, which takes no account of her own interest. Nevertheless adoptions are often long delayed. If it be held that the effect of a valid adoption by a widow is generally to divest in favour of the adopted son estates which have become vested in or through an heir of the last holder, it must mean that so long as the possibility of adoption exists, no one can safely deal with property the title to which may be affected by such adoption. This practical aspect of the matter was recognized by the Privy Council as long ago as 1876 in 3 I A 154,[1] in which their Lordships say (p. 193) :

> It may be the duty of a Court of justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption ; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be, in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over a woman possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it. . . .

That warning is, in my view, as appropriate now as it was in 1876. The relevant facts in the present case are that there were three brothers, members of a joint family, namely, Babaji, Laxman, and Vithal. Babaji died on 9th July 1919, leaving a son Govind, who died leaving a widow Tayaji and a daughter Bhima. Laxman, who died on 5th July 1919, had two sons, Sakharam and Shankar, both of whom predeceased him, and a daughter. Shankar died unmarried, but Sakharam left a widow Bayaji, who in 1923 adopted Balu, defendant 1. Vithal died in 1903 leaving a son Shiva and a daughter Avadi. Shiva died on 10th July 1919, leaving a widow Gouri, who remarried in 1926 or 1927. It has been found by both the lower Courts that when Shiva died he was the last surviving coparcener, and it was not disputed in second appeal that on his death his widow Gouri was his heir, and that on her remarriage the property passed to Avadi as the next heir, and the plaintiff claims by purchase through Avadi. The question which falls for decision in the appeal is whether the adoption by Bayaji, the widow of a deceased coparcener, of defendant 1, during the period in which Gouri was the heir of Shiva, had the effect of vesting the property in the adopted son and divesting it from the heirs of Shiva. On the facts the case falls within the decision of this Court in 14 Bom 463,[2] and the argument before us has mainly turned on whether *Chandra's case*[2] is inconsistent in principle with the recent decisions of the Privy Council, and must be taken to have been impliedly overruled.

In *Chandra's case*[2] there was a joint family consisting of a father and two sons Bhau and Nana. Bhau died first leaving a widow, then the father died and Nana succeeded to the joint family property. Nana afterwards died leaving him surviving a widow Gojarabai, who got possession of the property. After Nana's death Bhau's widow adopted the plaintiff as son to her husband, and brought a suit against Gojarabai to recover the property from her. The Court held that Nana, as the last surviving coparcener, became the absolute owner of the property, that on his death the coparcenary was at an end, and the property vested in his widow as his heir. The subsequent adoption by Bhau's widow did not divest the estate of Gojarabai since the brother's son was a more remote heir, from the point of view of inheritance, to the last survivor than the widow. The Court did not in terms hold that the adoption by Bhau's widow was invalid, though there is a dictum by the Privy Council in 60 I A 25,[3] that such was the effect of the decision. In view of 60 I A 242,[4] I think that the adoption in *Chandra's case*[2] must be treated as valid, and if the decision was otherwise, it must be treated to that extent as overruled, but the real question is whether the decision stands in relation to its effect upon the vesting of property. Mr. Kane contends that the effect of adoption by the widow of a deceased coparcener has the effect of reviving the coparcenary, and if that is so, there can be no doubt that the adopted son of the deceased coparcener Bhau would take in preference to the widow of Nana. But the decision is directly opposed to the contention of Mr. Kane, and I am not prepared to accept the view that the coparcenary was revived by the adoption of a son to Bhau.

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[1] **Raghunadha Deo v. Sri Brozo Kishoro, (1876) 1 Mad 69=3 I A 154 (P C).**

[2] **Chandra v. Gojarabai, (1890) 14 Bom 463.**

[3] **Bhimabai Jivangouda v. Gurunath Gouda, A I R 1933 P C 1=141 I C 9=57 Bom 157=60 I A 25 (P C).**

[4] **Amarendra Man Singh v. Sanatan Singh, A I R 1933 P C 155=143 I C 441=60 I A 242 =12 Pat 642 (P C).**

I now turn to the relevant decisions of the Privy Council. The first case to notice is 46 I A 97.[5] In that case by a family custom land had been granted out of the impartible family estate to younger sons for jivai or maintenance. The line of the younger sons became extinct, and thereupon the jivai reverted to the elder branch. Subsequently, the widow of the last holder of a jivai grant, who had died without issue, adopted a son. It was held that the adoption was valid, and that the son inherited the jivai grant. So far as its effect upon property is concerned, that decision seems to be of limited application. It is not really a question of divesting property, but of reviving a grant which had fallen into abeyance, and the question really turns on the effect of the family custom referred to.

The next case is 48 I A 513.[6] The question in that case turned mainly on whether a Hindu widow in a joint family could adopt without obtaining the consent of the husband's kinsmen, and that question has finally been disposed of in favour of the widow by *Bhimabai's case.*[3] The position with regard to property was that one Pundlik, who was a member of a coparcenary, died childless, and his widow adopted one Pandurang. It was held by the Privy Council that the property was divided in the lifetime of Pandurang. Subsequently Pandurang died, and Pundlik's widow adopted Yadao. The suit was brought by Yadao against Namdeo, who disputed the adoption and claimed to retain the property as the surviving member of a joint Hindu family. It was held by the Privy Council that the adoption of Yadao was good, and that the plaintiff was entitled to his divided share of the joint family. The only real question in dispute was as to the validity of the adoption; if that was valid the plaintiff's title was established. The next case is 60 I A 25.[3] In that case it was definitely established, contrary to the view of the law which had prevailed in this Presidency, that a Hindu widow, unless expressly forbidden by her husband to adopt a son to him, could do so, although he had died undivided, and she had not obtained the consent of any of the surviving coparceners. In that case again, if the adoption was good, the position with regard to the property presented no difficulty. At the date of the adoption a coparcenary was in existence, and the adopted son necessarily took his share in the coparcenary property, and on the death, shortly after the adoption of the only other coparcener, the whole property vested in the adopted son as the last surviving coparcener. *Chandra's case*[2] was discussed in the judgment of the Board, and was distinguished on the facts. The Board certainly did not overrule the case or even express disapproval of it, although they stated that in *Chandra's case*[2] the adoption was held to be invalid.

The next case and the case which has given rise to most difficulty, is 60 I A 242.[4] In that case the family property consisted of an impartible zamindari governed by the rule of lineal primogeniture and in which by custom females were excluded from inheritance. The last adult holder of the zamindari died leaving a widow, to whom he had given authority to adopt in the event of his son dying. The son succeeded to the estate, but died unmarried at the age of twenty years and six months, and thereupon the widow adopted a son. It was held that such adoption was valid, and it was admitted by the parties that in that event the appellant was entitled to the property as against the plaintiff, Banamalai, who was in possession, and claimed through the younger branch of the family. The Board in their judgment entered into an elaborate discussion of the true principles on which a Hindu widow's right to adopt is based, and they held that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites, and that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family or an out-

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5. Pratapsing Shivsing v. Agarsingji Raisingji, A I R 1918 P C 192=50 I C 457=43 Bom 778=46 I A 97 (P C).

.Yadao v. Namdeo, A I R 1922 P C 216=64 C 536=49 Cal 1=48 I A 513 (P C).

sider claiming by reverter or by inheritance, could not be in itself the test of the continuance or extinction of the power of adoption. The power continues in existence so long as the widow is the only person to continue the line. *Chandra's case*[2] was not mentioned, and I see nothing in the judgment of the Board to suggest that they disapproved of the reasoning upon which that case was based so far as it relates to the vesting or divesting of property.

The last case in the Privy Council to which reference need be made is 62 I A 161.[7] That again was the case of an impartible estate governed by the rule of lineal primogeniture. The line of the eldest son had become extinct by the adoption of Chhatrasingji, the son of Chandrasangji, into another family, and thereupon the property vested in Bhimsangji, the younger brother of Chandrasangji. Subsequently, the widow of Chandrasangji adopted to her husband, and it was held that the adoption was valid, and that the adopted son took the estate, thereby divesting the property from the younger branch. The case is really of the same nature as *Amarendra's case*.[4] The point to notice in all these cases before the Privy Council is that a coparcenary was in existence at the time of the adoption. It is true that in *Amarendra's case*[4] and *Vijaysingji's case*,[7] the coparcenary was of a peculiar nature, but an impartible zamindari has been held to be a coparcenary though of a special character. The effect of the decisions is to show that in a coparcenary of that nature adoption in the line of the elder son will divest the property from the line of the younger son, although the latter did not take by survivorship. But we have been referred to no case in the Privy Council, and the learned advocates in this case to whose industry we are much indebted, have told us that they know of no case, in which the adoption took place after the termination of the coparcenary. There appears to be no authority in the Privy Council directly holding that after the determination of the coparcenary by the death of the last coparcener a subsequent adoption by the widow of a deceased coparcener will vest the coparcenary property in the adopted son to the exclusion of the heir of the last holder, other than the widow herself.

It remains to notice certain decisions of this Court, in which the Privy Council decisions have been discussed. In 37 Bom L R 193,[8] Shingne, J. held, in a case very similar to the present, that the adoption by the widow of the deceased coparcener was invalid, and that *Chandra's case*[2] had not been overruled. The decision, I think, cannot be supported in so far as it holds that the adoption itself is invalid. In 37 Bom L R 786,[9] the question was discussed before a Bench of this Court. Broomfield, J. expressed the view that *Chandra's case*[2] did not in fact hold that the adoption then in question was invalid. But he was of opinion that if it did so hold, then it was inconsistent to that extent with *Amarendra's case*.[4] He expressed the further view, however, that *Chandra's case*[2] had not been overruled in its effect upon the vesting or divesting of property. I think that the decision in that case was correct. In 38 Bom L R 94[10] the position was that there was a joint Hindu family consisting of an uncle and a nephew. The nephew had a sister. The uncle died first, and subsequently the nephew died, and thereafter the uncle's widow gifted away part of the property, and then adopted the plaintiff. The plaintiff sued to recover the property. It was held that the adoption by the widow was valid, but that inasmuch as the joint family had come to an end before the date of the adoption, the adopted son could not be treated as becoming a member of the joint family, and he was postponed to the sister of the nephew, who was a nearer heir in point of inheritance. I think this decision was clearly right. The only other case that it is necessary to mention is 38 Bom L R 100.[11] In that case a Hindu died leaving him surviving a widow, a daughter and the widow of a predeceased son. After the death of the widow, the daughter-in-law adopted a son. It was held that the adoption was valid, and had the effect of divesting the estate from the daughter in favour of the adopted son, who was in the position of a superior heir. The case is clearly distinguishable on the facts from *Chandra's case*,[2] and the appeal giving rise to this reference, because the adopted son was in that case a superior heir, but the question whether it was rightly decided arises on the reference [Question II (*a*)] and, having regard to the importance of the question and to other pending appeals, I think that we ought to answer it.

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[7] Vijaysingji Chhatrasingji v. Shivsangji Bhimsangji, A I R 1935 P C 95=155 I C 493=59 Bom 360=62 I A 161 (P C).

[8] Vishnu v. Lakshmi, A I R 1935 Bom 182=158 I C 1085=37 Bom L R 193.

[9] Shankar v. Ramrao, A I R 1935 Bom 427=159 I C 697=37 Bom L R 786=60 Bom 89.

[10] Dhondi Dnyanoo v. Rama Bala, A I R 1936 Bom 132=161 I C 849=60 Bom 83=38 Bom L R 94.

[11] Umabai v. Nani, A I R 1936 Bom 135=162 I C 133=60 Bom 102=38 Bom L R 100.

In my opinion the decision is wrong, but the question appears to me the most difficult one arising on this reference. Assuming that I am right in thinking that *Amarendra's case*[4] decides that the existence of a widow's right to adopt is independent of any question relating to the vesting or divesting of property, does it follow that the adopted son inherits all property which would have passed to a natural born son of his adoptive father? It is no doubt a general principle of Hindu law that an adopted son acquires all the rights of a natural born son, with certain minor exceptions not material to be here noticed. But there is another well established rule of Hindu law that on the death of a separated householder or last surviving member of a coparcenary, the inheritance passes at once to the nearest heir or group of heirs and cannot be held in suspense subject to a possible adoption : *see* 22 Bom 416.[12] Hindu law does not recognize, as does English law, an estate vested, but liable to be divested. In the case of undivided property, the inheritance does no doubt open to let in a coparcener subsequently born or adopted, but the law regards the vesting in the existing coparceners as merely temporary to prevent the ownership from being in abeyance : *see* Kapur's Law of Adoption, p. 240. It seems to me impossible, however, to apply that rule to the case of property which has vested in the heir of a divided Hindu. To do so would be to employ the legal fiction that an adopted son is conceived in the lifetime of its adoptive father, not for the purpose of mitigating the difficulties arising from a strict application of the law, but for the purpose of creating difficulty. There are a great many Indian cases dealing with the effect of adoption by a widow of a Hindu divided at the date of his death upon the divesting of his property. The rules established by those cases are summarized in Mulla's Principles of Hindu Law, Edn. 8, at p. 553 (published in 1936 after the decision in *Amarendra's case*[4]), as establishing that the adoption by such a widow cannot divest any estate by inheritance unless the estate at the time of adoption vested in the adopting widow either as her husband's heir or as the heir of her son dying without leaving any wife, children, or other heir nearer than herself. These rules have existed for many years, and a great number of titles must depend upon them. In my opinion, it would be quite wrong for any Court in this country to hold that the Privy Council intended to cast a doubt on long-established rules which were not referred to, and to override cases not cited, on which titles depend. So to hold would in my judgment be mischievous in the extreme, and would open the gates to a flood of litigation. It may be that the reasoning upon which some of the decisions are based is inconsistent with the reasoning in *Amarendra's case*,[4] but the rules established by the cases may be justified on other grounds.

The conclusions to which I have come upon the cases are : (1). That a widow of a deceased member of a Hindu joint family can adopt to her husband without obtaining the consent of her husband's relations. (2). That a Hindu widow's right to adopt is based on religious considerations, and is not affected by any considerations as to the vesting or divesting of property. (3). That where a coparcenary exists at the date of the adoption, the adopted son becomes a member of the coparcenary, and takes his share in the joint property accordingly, and this principle applies although the coparcenary is a zamindari having the peculiar feature of being governed by the rule of lineal primogeniture. (4). That where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her. The actual questions submitted to us are as follows : I. Does the fact of the coparcenary being extinct at the date of an adoption by a widow other than the widow of the last male holder invalidate the adoption? II. If not, does such an adoption have the effect of divesting property in favour of the adopted son in the following cases: (*a*) When the property at the date of the adoption has already vested in an heir of the last male holder remoter than a natural born son of the adoptive father? (*b*) When the property at the date of the adoption has already vested in an heir of the last male holder nearer than a natural born son of the adoptive father? III. If so, when does the divestment take place—immediately, or on the death of the heir in possession?

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[12] **Amava v. Mahadgouda, (1898) 22 Bom 416.**

I would answer them as follows:

No. I ...	... In the negative.
No. II (*a*) ...	... In the negative.
No. II (*b*) ...	... In the negative.
No. III ...	... Does not arise.

N. J. Wadia, J., has authorized me to say that he concurs in this judgment.

Rangnekar, J.—This case is referred to this Full Bench by a Divisional Bench for the determination of some important questions relating to the validity of an adoption by a Hindu widow. The facts upon which the questions are raised may be shortly stated. The pedigree showing the relationship of the parties is printed at p. 2 of the lower appellate Court's judgment. One Balu had five sons. Of the five sons Bhiva and Bhagoji separated from the family, and the three remaining sons, Babaji, Laxman and Vithal, continued to live as members of a joint family. Vithal died in 1903 leaving him surviving a son Shiva and a daughter Avadi. Babaji had a son Govind. Laxman had two sons, Sakharam and Shankar, and a daughter Tanhi. Of these, Shankar died first and thereafter Sakharam died in 1908 leaving his widow Bayaji. Then in 1919 there were four deaths in the family within four days. The first was that of Laxman on 5th July 1919. The second was of Babaji on 9th July 1919. Then Babaji's son Govind died on 10th July 1919, leaving his widow Tayaji and a daughter. Within a few hours thereafter, Shiva, Vithal's son, died leaving his widow Gouri and his sister Avadi. Thus, on 10th July 1919, Shiva was the last surviving coparcener in the family, and on his death the estate vested in his widow Gouri. The family was governed by the law of the Mitakshara applicable to Hindus in this Presidency. In 1923, Sakharam's widow Bayaji adopted Balu as a son to her deceased husband. In 1926 Shiva's widow Gouri remarried, and it is common ground that on her remarriage she forfeited her interest in her husband's estate. In 1929, the plaintiff, who is a stranger to the family but was married to Laxman's daughter, Tanhi purchased the property, which is the subject matter of the suit, from Avadi, the daughter of Vithal, and in 1931 he brought a suit to recover possession of this property from the defendants. Balu, the adopted son of Sakharam, was defendant 1 and the principal contesting party, and his mother, who was the widow of Sakharam, was defendant 3. The position of the other defendants to the suit is not material and need not be referred to. It is clear from the facts that at the date of adoption there were only three widows left in the joint family—Tayaji, the widow of Govind; Bayaji, defendant 3; and Gouri, the widow of Shiva. The trial Court held that the adoption was invalid. The first appellate Court held that the adoption was valid, but it could not affect the plaintiff's rights.

In second appeal, the contentions on behalf of the appellant (defendant 1) were: (1) that his adoption was valid and he was entitled to divest the estate vested in Gouri, and (2) 14 Bom 463,[2] on which the plaintiff relied, was impliedly overruled by recent decisions of the Privy Council. On behalf of the plaintiff it was argued that *Chandra* v. *Gojarabai*[2] was not overruled and, therefore, the adoption was invalid, and that, in any event, the adopted son was not entitled to divest the estate which had vested in Shiva's widow. On these facts, three questions set out in the referring judgment are referred to us. It is conceded by Mr. Kane that there is no text of Hindu law as such bearing on the questions and that the answers to the questions must depend upon judicial decisions and general principles of Hindu law. It becomes necessary, therefore, to examine the cases relied upon before us in support of the respective contentions; but, before doing so, it will not, I venture to think, be out of place to repeat that oft-quoted, but often ignored, rule that a case is an authority for what it decides and not for what may seem logically to follow from it. It will also be useful to bear in mind that a Court of law ought to hesitate before upsetting a long course of judicial decisions and particularly where on the faith of such decisions rights of the subjects have for a long time come into existence and dispositions of property have been made and entered into. In this connexion I may refer to the observations of no less an authority than Lord Blackburn in (1880) 5 A C 214.[13] His Lordship (at p. 239) cited the following passage from Bramwell, L. J. in (1859) 2 El & El 209[14]:

> I cannot but think we are concluded. The decisions and opinions are such and so many that we ought to follow them. This is my conviction. I think at least none but the ultimate Court of appeal should overrule opinions so expressed, even if that should, as to which I content myself with observing that where the law has been laid down, and generally supposed and taken to be correctly laid down and acted on, great Judges have doubted much whether, if wrong, the only remedy was not in the Legislature.

Lord Blackburn then proceeds to observe as follows (p. 239):

> I quite agree that where, from the nature of the decision, there is reason to believe that rights have been regulated and arrangements as to property made on the faith that the law was as laid down, it may be right to follow the decision even if wrong.

The observations of Lord Watson in (1898) A C 593[15] are also pertinent (p. 605):

> The question of Scottish law, which was brought before but was not decided by this House in 2 Dow 474[16] is, in my opinion, as open now as it was in the year 1814. Since that date more than eighty years have elapsed. During that period the English decisions which were criticized by Lord Eldon have been consistently followed in English Courts; and, to my apprehension, it would be beyond the function of this House to alter them now, as might have been done in the beginning of the century. In Scotland, during the same period, there has not been a single decision upon the point save in the present case.

The same principle was accepted by the Privy Council in 13 M I A 560[17] in these words (p. 572):

> It must not then be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

In *Chandra* v. *Gojarabai*[2] the facts were that one Krishnaji and his two sons, Bhau and Nana, were members of an undivided family. Bhau died first, leaving a widow. Then Krishnaji died. On his death, Nana succeeded to the family property. Nana afterwards died, leaving him surviving his widow, the defendant, Gojarabai, who then got possession of the said property. After Nana's death, however, Bhau's widow adopted the plaintiff as son to her husband, and he brought a suit against Gojarabai to recover possession of the property from her. He alleged that Bhau in his lifetime, with the concurrence of Krishnaji, had given express authority to his wife to adopt a son after his death. The Court of first instance gave the plaintiff a decree. On appeal the District Judge rejected his claim. The plaintiff appealed to the High Court. The judgment in that case was delivered by Telang, J., who, as is well known, was a brilliant Sanskrit scholar and one of our most eminent Judges. After an examination of the cases in 8 Bom H C R (A C) 114;[18] 10 M I A 279;[19] 3 I A 154;[1] 8 I A 229;[20] 14 I A 67[21] and 17 Cal 122[22] the learned Judge deduced the following (p. 469):

> [An] adoption by a widow under her husband's authority has the effect of divesting an estate vested in any member of the undivided family of which the husband was himself a member; but it does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband.

Then, after referring to 12 I A 137[23] the learned Judge observed that the rule must be supplemented by this addition, that the adoption, though authorized by the husband, cannot divest the estate which has already vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime. He then observed as follows (p. 470):

> That adoption does not take place till after the death of Nana, the husband of the defendant Gojarabai. At the time of his death, Nana was full owner as last survivor of the joint family. The property then devolved as his, and a subsequent adoption, however well authorized, to Bhau, a collateral relation of Nana, cannot

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[13] Julius v. Lord Bishop of Oxford, (1880) 5 A C 214=49 L J Q B 577=42 L T 546=28 W R 726=44 J P 600.

[14] Reg v. Bishop of Chichester, (1859) 2 El & El 209=29 L J Q B 23=6 Jur N S 120=119 R R 688=7 W R 629.

[15] Sailing Ship 'Blairmore' Co. v. Macredie, (1898) A C 593=67 L J P C 96=79 L T 217=3 Com Cas 241=14 T L R 513.

[16] Smith v. Robertson, (1814) 2 Dow 474=14 R R 174.

[17] Pattabhiramier v. Venkatarow Naicken, (1870) 13 M I A 560=15 W R P C 35=2 Suther 410=2 Sar 623 (P C).

[18] Rupchand Hindumal v. Rakhmabai, (1871) 8 Bom H C R (A C) 114.

[19] Mt. Bhoobun Moyee Debia v. Ram Kishore Acharj, (1863-66) 10 M I A 279=3 W R P C 15 (P C).

[20] Pudma Coomari Devi v. Court of Wards, (1881) 8 Cal 302=8 I A 229=4 Sar 285 (P C).

[21] Thayammal v. Venkatarama, (1887) 10 Mad 205=14 I A 67=5 Sar 10 (P C).

[22] Tarachurn Chatterji v. Sureshchunder Mukerji, (1890) 17 Cal 122=16 I A 166=5 Sar 379 (P C).

[23] Bhubaneswari Debi v. Nilkomal Lahiri, (1886) 12 Cal 18=12 I A 137=4 Sar 651 (P C).

divest the defendant Gojarabai, who claims under Nana and does not claim through Bhau at all.

In an earlier part of the judgment (at p. 468) the learned Judge had observed that if the adoption had taken place during Nana's lifetime, it would have prevented Nana from taking Bhau's joint share by survivorship, and Bhau's son would, on Nana's death without a son, have succeeded by survivorship to the whole estate. At p. 471 he observed as follows:

> When the inheritance devolved from Nana upon his widow Gojarabai, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated house-holder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption.

In *Bhubaneswari's case*[23] the competition was between a person adopted by the widow of a pre-deceased brother of the original owner of the property and the natural son of another brother of the original owner as to the right to succeed to the property on the death of the owner's widow. On the death of the widow the last-mentioned nephew succeeded and it was after this that the adoption was made. It was held by the Privy Council that an adoption after the death of a collateral does not entitle the adopted son to come in as heir to the collateral.

The question then is, what is the effect of the decision ? It is argued that it was not there held in terms that the adoption was invalid. That may be so. The case was decided in 1890, and since then, as correctly observed by the learned author of Mulla's Hindu Law, 8th Edn., at p. 533, although the actual decision is that the adopted son could not recover the property of the family from Nana's widow, the decision has been always understood in Bombay as laying down that the power of Bhau's widow to adopt had terminated, and has been, therefore, understood on the strength of other decisions of the Privy Council, which will be mentioned presently, that the adoption was invalid. There is, however, high authority for this view. In 60 I A 25,[3] *Chandra* v. *Gojarabai*[2] was expressly relied upon on behalf of the respondent. Referring to it, Sir Dinshaw Mulla observed as follows (p. 40):

> The question in that case was whether an adoption by the widow of a coparcener, after the death of the last surviving coparcener, and after the estate had vested in his widow or another person as his heir, was valid, and it was held that it was not.

I agree with the learned author of Mulla's Hindu Law that in the face of this dictum it is not permissible now to say that that case did not hold that the adoption was invalid: Mulla's Hindu Law, 8th Edn., p. 532. *Chandra* v. *Gojarabai*[2] has been also followed for all these years by the Madras High Court. The question as to the position when the power of a widow to adopt is extinguished will be adverted to later.

The question now is, whether *Chandra* v. *Gojarabai*[2] is impliedly overruled by the latest Privy Council decisions. In this Presidency the law of adoption is wider than that prevailing even in Madras, and it is well settled that where the husband was separate, his widow can always adopt without any authority from her husband or without the consent of any of his sapindas, unless she was expressly or impliedly prohibited from making an adoption by her husband. Where the family was joint, the law seems to have been the subject of fluctuations. In 1879, and even before it, this Court had held that the widow of a deceased coparcener in a joint family could not adopt, except when she had her husband's authority or the consent of his undivided coparceners. The consent of the father-in-law was considered to be sufficient. Since then this principle was followed consistently without any dissent by this Court in a series of decisions, to which no reference is now necessary. In 1921, the same question came up in the case in 48 I A 513[6] before the Judicial Committee from the Central Provinces. The parties were Hindus and subject to the law applicable in this Presidency. The facts were that one Pundlik, his cousin Namdeo, and Namdeo's sons Rambhau and Pandurang, were members of a joint family. Pundlik died childless in 1905, leaving his widow Champubai. Soon after, Namdeo gave his son Pandurang in adoption to Champubai. The adoption was evidenced by a deed. The adopted son died unmarried in 1907, and thereafter Champubai adopted Yadao without the consent of Namdeo and his son Rambhau. The Judicial Commissioner of Nagpur held that there was no separation of the joint family of Pandurang (the adopted son) and Namdeo at the time of Pandurang's death and that the adoption of Yadao having been made without the consent of Namdeo and his son Rambhau was invalid. There was an appeal to the Privy

Council. The judgment of the Board was delivered by Sir John Edge, and it was held that the adoption was valid. Before the Board the case in 6 Bom 498,[24] which was the leading case on the subject in this Court, was relied upon. The Board held that the deed of adoption also effected a separation between Pandurang and Namdeo, so that the estate of Pandurang passed to Champubai on his death as his heir. The Board also held that Pundlik had not prohibited the adoption. Then, the Board held, as Sir Dinshaw Mulla points out in *Bhimabai's case*,[3] the estate being vested in Champubai, and there being no prohibition to adopt, she was free to adopt another son to her husband without the consent of Namdeo and his son Rambhau, and she adopted Yadao. An adoption made in these circumstances was obviously valid, and required no further consideration. But then, as pointed out in *Bhimabai's case*,[3] both sides invited the Board—of this however there is no trace in the report of the case—to decide whether, even if Pandurang had not separated from Namdeo, Namdeo's consent was necessary to the adoption, and this question was considered in the latter part of the judgment. Their Lordships expressed their disapproval of the decision in *Ramji* v. *Ghamau*.[24] Thereafter in this Court it was considered that the remarks of the Board with reference to *Ramji* v. *Ghamau*[24] were obiter dicta, and that *Ramji* v. *Ghamau*[24] was not, therefore, overruled by the Board, and the principles laid down in that case were re-affirmed by a Full Bench in 50 Bom 468.[25] The same question came up for consideration before the Board in 1932 in 60 I A 25.[3] The facts in that case were as follows. Nilkanthagouda, Khandappagouda and Jivangouda were three brothers of whom Nilkanthagouda and Jivangouda were undivided and Khandappagouda was divided from them. Khandappagouda died in 1912 leaving a son Gurunathgouda. Jivangouda died in 1913 leaving his widow Bhimabai. Nilkanthagouda died in 1915 leaving his son Dyamangouda. In 1919 Dyamangouda died leaving his son Dattatraya, who was born in 1918. During the lifetime of Dattatraya, Jivangouda's widow Bhimabai adopted Narayan in 1919. Afterwards in 1920 Dattatraya died. Gurunathgouda brought a suit questioning the validity of Narayan's adoption. The High Court of Bombay, following the Full Bench judgment in *Ishwar Dadu's case*,[25] held that the adoption was invalid as the joint family had not ceased and Bhimabai could not adopt without the consent of the sole coparcener Dattatraya. In the judgment delivered by Sir Dinshaw Mulla it was held that *Ramji* v. *Ghamau*[24] was overruled by *Yadao's case*[6] and that the decision in *Ishwar Dadu's case*[25] was erroneous. The Board reversed the High Court's judgment and held that the adoption was valid. Although that decision has been the subject of strong and weighty criticizm in this country, it must now be taken as definitely established that in this Presidency the widow of a deceased coparcener in a joint family has an inherent power to make an adoption to her deceased husband without the consent of his coparceners.

The next case to be noticed is the case in 46 I A 97.[5] But before proceeding to do so, it would be convenient at this stage to consider what exactly is the position in the case of an impartible zamindari or estate, as that was the nature of the estate in that case and in the other cases to be discussed later. It is now settled, after some fluctuations, that in the case of an ancestral impartible estate, governed by Mitakshara law, the succession will devolve by survivorship upon the eldest coparcener of the senior line in preference to one nearer in blood. But the presumption of lineal primogeniture may be ousted by proof of a different rule of devolution by a special family custom. If the estate is separate or self-acquired property of the deceased zamindar, it will descend in accordance with the ordinary rules of succession to the estate of a Hindu separated from his family, and the degree of nearness of kinship will be the deciding factor. If there are more persons than one standing in the same degree of relationship to the last holder, the eldest, if all belong to the same line, and the eldest in the senior branch, if there are more branches than one, will be the preferable heir. The rules to apply will be the rules which govern succession to partible property, subject to such modifications only as flow from the character of the estate as impartible estate. So that, as Mayne observes, at p. 467, the fiction of such

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24. Ramji v. Ghamau, (1879) 6 Bom 498 (F B).

25. Ishwar Dadu v. Gajabai, A I R 1926 Bom 435 =96 I C 712=50 Bom 468=38 Bom L R 782 (F B).

an estate being joint family property is recognized for ascertaining the succession. The cases will be found collected in Chs. 8, 11 and 18 in Mayne on Hindu Law. Then the learned author refers to 6 M H C R 93,[26] and holds at p. 351 that the principle applicable to coparcenary property is applicable to impartible zamindari and points out that in that case the Court held that the zamindari, though impartible, was still coparcenary property, and that the members of the undivided family acquired the same right to it by birth, as they would have done to any other property, subject only to the limitation of the enjoyment to one.

To revert to *Pratapsing's case*,[5] the facts were that by the family custom of a Hindu Rajput family in the Bombay Presidency land was granted out of the impartible family estate to younger sons for jivai or maintenance, and reverted to the estate upon a failure of the grantee's male descendants, widows being excluded from inheriting. Prior to 1903 some jivai lands were held by one Kaliansing. He died in October 1903, without a male issue, but leaving a widow. Shortly after his death, the widow adopted a son to her husband, who was the appellant before the Board. The then Thakur, who was the head of the senior branch, brought an action in ejectment upon the ground that the land reverted to him as the owner of the original estate under the custom referred to above, and his claim was denied by the widow and the adopted son. The Subordinate Judge held that the custom was proved, but he held that the Thakur had failed to establish the custom debarring the widow of a jivaidar from inheriting his estate or from making an adoption to him. He further held that the defendant was validly adopted but the adoption had not affected the plaintiff's right to resume the jivai, and on certain evidence and in particular some documents executed between the parties in earlier proceedings, he held that the plaintiff was estopped from questioning the title of the adopted son. In the result, he dismissed the plaintiff's claim. In appeal, the High Court agreed with the Subordinate Judge on the question of the custom of reversion, but they disagreed with him on the construction of the documents on the question of estoppel, and held that, although the defendant was validly adopted and was entitled to succeed to other property left by his adoptive father, yet as his adoption took place after the reversion had taken effect and after the land had vested in the plaintiff, which occurred immediately Kaliansing died, the plaintiff was entitled to succeed. Accordingly they reversed the order of the Subordinate Judge and decreed the plaintiff's claim. In the judgment of the Privy Council delivered by Mr. Ameer Ali, their Lordships were inclined to agree with the Subordinate Judge as to the intent and meaning of the documents, but proceeded to consider the question of the rights of the parties upon a larger ground as to whether, if the adoption was valid as held by the Bombay High Court, the decision of that Court, that as the estate had reverted and vested in the Thakur, the adoption could not divest it, was correct. I will take the liberty of quoting their Lordships' observations on this point as they have a material bearing on some of the questions which are referred to this Full Bench. Their Lordships observed as follows (pp. 106-7):

> Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. And a learned authority on Hindu law has explained that the only express text by which the heritable rights of an adopted son are 'contracted' refers to the case of his sharing the heritage with an after-born natural (aurasa) son. In every other instance the adopted son and the son of the body stand exactly in the same position.

Then they referred to 7 M I A 169,[27] and after explaining it, observed as follows (pp. 107-8):

> But it was also pointed out that there was no power under the Hindu law to compel a widow to adopt. Unless there is a time limit imposed in the authority which empowers her to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted . . . The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her . . .

Then, towards the end of the judgment their Lordships observed (p. 108):

> But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be *en ceinte* the reversion naturally would remain in suspense until the birth of the

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[26] Gavuridevamma v. Ramandora Garu, (1870) 6 M H C R 93.

[27] Bamundoss Mookerjea v. Mt. Tarinee, (1858) 7 M I A 169=1 Sar 616 (P C).

> child, to see whether it was a male or female . . . It may be that if a Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such case totally different considerations would arise. But here there is nothing of the kind to modify the true application of the Hindu law.

It is important to notice that the Subordinate Judge in that case had held that the adopted son had failed to establish that his adoption, though valid, had the effect of divesting the estate which had reverted to the Thakur, and he further held that the plaintiff was estopped from disputing the title of the widow and the adopted son by reason of the earlier documents. Their Lordships were inclined to agree with him on the latter question, and therefore the adopted son could have succeeded on that ground alone, and it was not necessary to consider the question whether the adoption had the effect of divesting the estate. It was argued for the appellant however that the adopted son had all the rights of a posthumous son, and that the adoption divested any estate which would have been divested by a posthumous son, and the cases in 3 I A 154,[1] 45 I A 156[28] and 34 I A 107[29] were relied upon. On the other hand, it was argued that the rights of an adopted son dated from his adoption and did not relate back as though he was a posthumous son. It was in reference to these contentions that their Lordships made the observations which I have set out. It is important to note that all the cases on which the appellant relied in support of this part of his case were cases in which the impartible estate was held to be joint and undivided, where the ordinary principles applicable to succession in the case of partible property were held to be applicable. In *Raghunadha's case*[1] the impartible property was there regarded as joint; in *Madana Mohana's case*[28] the judgment expressly states that the family was joint, and there can be no doubt that *Bachoo* v. *Mankorebai*[29] was a case of an ordinary coparcener holding partible property. Now, if in *Pratapsing's case*[5] the property was partible, there can be no doubt that the adoption made by Kaliansing's widow would have been valid, as it was made during the lifetime of the Thakur, who was a coparcener or a member of the joint family. The estate was ancestral, and there was no allegation that at any time the family had become divided. In my opinion therefore there is nothing in that case which is in conflict with the rule laid down in *Chandra* v. *Gojarabai*,[2] and it is difficult to hold that the coparcenary estate had come to an end as was the case in *Chandra* v. *Gojarabai*.[2] The case, moreover, was rested upon a claim to reversion.

The next case is 60 I A 242,[4] which is very strongly relied upon in support of the contention that *Chandra* v. *Gojarabai*[2] must be taken to have been impliedly overruled. This also was a case of an impartible zamindari, and it was proved that there was a custom in the family excluding the females from inheriting. The facts were that Raja Brajendra died leaving his son Raja Bibhudendra and his widow Rani Indumati. He executed a deed by which he authorized Rani Indumati to adopt in the event of the son dying. The son succeeded to the impartible zamindari held by his father but died unmarried at the age of 20 years and six months. Thereupon Rani Indumati, who was his mother, made an adoption to her own deceased husband. A suit was instituted by Banamalai, who was the great-grandson of Krishna Chandra, the common propositus. The zamindari was claimed on the basis that it was separate property. His claim was opposed by Rani Indumati and the adopted son. The Courts in India held the adoption to be invalid on the ground that Rani Indumati could not exercise her power to adopt under the deed so as to divest the estate vested in the plaintiffs, as the adoption was made a few days after the death of the son, Raja Bibhudendra The judgment of the Board was delivered by Sir George Lowndes, and the actual decision of the Board was that as the natural son had left no son to continue the line nor a widow to provide for its continuance by an adoption, the adoption by his mother was valid, although the zamindari was not vested in her, and although the son had attained the age of full ceremonial competence. In coming to that conclusion, after discussing various authorities as to the limits to the exercise of a power to adopt possessed by a Hindu

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28. **Madana Mohana v. Purushothama, A I R 1918 P C 74=46 I C 481 = 41 Mad 855 = 45 I A 156 (P C).**
29. **Bachoo Hurkisondas v. Mankorebai, (1907) 31 Bom 373 = 34 I A 107 = 9 Bom L R 646 (P C).**

widow, their Lordships followed *Pratapsing's case*,[5] explained *Madana Mohana's case*,[28] approved of 26 Bom 526[30] and doubted the decision in 37 Bom 598.[31] Again, for the reasons which I have already given in connexion with *Pratapsing's case*,[5] if this had been the case of an ordinary partible property held under the Mitakshara law by a joint and undivided family, there can be no doubt that the adoption was valid. As in *Pratapsing's case*,[5] here also succession had to be determined on the principles of coparcenary property, as the adoption was made whilst Banamalai was alive; and, in my opinion therefore the decision, which must be confined to the facts of the case, does not affect the correctness of the decision in *Chandra* v. *Gojarabai*,[2] where, as pointed out by Telang, J. at the time of adoption, the joint family was extinct. Apart from the fact that *Chandra* v. *Gojarabai*[2] is not even referred to, the principle laid down in that case did not at all arise before the Board upon the facts in *Amarendra's case*.[4] Although the zamindari was separate, the succession devolved on the same principles as would be applicable in the case of partible coparcenary property. Banamalai took the property subject to being divested by the son of a coparcener, natural or adopted.

Mr. Kane says that *Bhimabai* v. *Tayappa*,[31] which in its turn followed *Chandra* v. *Gojarabai*,[2] was considered to be no longer authoritative, and therefore *Chandra* v. *Gojarabai*[2] must be treated as being overruled. I am unable to accept this contention. Nor does it appear that *Chandra* v. *Gojarabai*[2] was expressly relied upon in support of the decision in *Bhimabai* v. *Tayappa*.[31] It does not follow that because a case, in which some other case was referred to, was overruled, therefore the latter must also be taken to have been overruled. Mr. Kane however argues that having regard to their Lordships' opinion in *Amarendra's case*[4] that the true principle must be founded upon "the religious side" of Hindu doctrine and that the validity of adoption must be judged from the religious and ceremonial side and that the power to adopt does not depend in any way on the vesting of property or divesting of it, the adoption in this case is valid. This contention is opposed on behalf of the respondents. Now, the question is, whether the only test of the validity of an adoption is the so-called religious efficacy of it, or do other considerations also come in from the point of view of rights to property which would also be material in determining the validity of an adoption? At p. 134 Mayne in his Hindu Law and Usage, 9th Edn., observes as follows:

> It must not be supposed that the religious motive for adoption ever excluded the secular motive. The spiritual theory operated strongly upon the Shastries who invented the rule; but those who followed them were, in all probability, generally unconscious of any other aim than that of securing an heir, on whom to lavish the family affection which is so strong among Hindus.

In fact, as Mayne points out, the earliest instances of adoption found in Hindu legend are adoption of daughters. Then Mayne refers to adoptions made in other communities and among other peoples, such as Jats, Sikhs, Muhammadans. It is not unknown that adoptions are made among Parsees, and were not unknown even among the Western nations. Then, after referring to earlier Privy Council decisions, and discussing the question as to the materiality of the motive of the adopting widow, whether she acted from religious motives or not or for supposed religious benefits to flow from the adoption, Mayne observes at p. 170 as follows:

> It does not seem quite clear, even now, whether their Lordships are of opinion that the motive which operates upon the mind of a widow in making an adoption, can be material upon the question of its validity, where she has obtained the necessary amount of assent; that is, whether evidence would be admissible which went to show that the widow was indifferent to the religious benefits supposed to flow from an adoption to her husband, or even disbelieved in the efficacy of such an adoption; and that her real and only object in making an adoption was to enhance her own importance and position, and to prevent the property of her late husband from passing away to distant relations. With the greatest deference to any conclusions to the contrary, which may be drawn from the above passages, it seems to me that the Judicial Committee did not mean to lay down that such evidence would be material or admissible. The fair result of all their judgments appears to be that the assent of one or more sapindas is necessary, as a sort of judicial decision that the act of adoption is a proper one.

Then the learned author points out that in Bombay, where the widow acts on her own discretion, it was for sometime laid down that proof that she had been acting from sinful or corrupt motives in making an adoption would vitiate it (pp. 171-72):

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30. Ramkrishna v. Shamrao, (1902) 26 Bom 526 =4 Bom L R 315.

31. Bhimabai v. Tayappa Murarrao, (1913) 37 Bom 598=21 I C 107=15 Bom L R 783.

> The Courts however were so liberal in placing the most favourable construction upon her acts and motives, that no case appears to have arisen in which an adoption was set aside for such a reason. The whole question was referred to a Full Bench in 1898 when it was decided that, inasmuch as the adoption procured for her husband all the religious benefits which he could have desired, any discussion of her motives was irrelevant.

Then the learned author considers the case of an adoption made by a widow with the consent of the only adult sapinda of an undivided family and proceeds to observe as follows (p. 172):

> But where the assent is fair and bona fide, it cannot be objected to on the ground that it did not arise from religious motives. I have already suggested that, even according to Brahminical views, religious grounds were not the only ones for making an adoption, and that among the dissenting sects of Aryans, and all the non-Aryan races, religious motives had absolutely nothing to do with the matter. But further, when a religious act comes to be indissolubly connected with civil consequences, it follows that the act may be properly performed, either with a view to the religious or the civil results. Not only so, but that if the act is in fact performed the civil consequences must follow, whatever be the motive of the actor.

An eminent Hindu lawyer and scholar, Golapchandra Sarkar Sastri, in his work on Hindu Law, 7th Edn., observes at p. 193 as follows:

> It is erroneous to suppose that the law of adoption owed its origin to the doctrine of spiritual benefit conferred by sons.

Then he observes at p. 194 as follows:

> If one carefully reads the passages of the Smritis, extolling the importance of sons in a spiritual point of view, he will find that they all relate primarily to the real legitimate sons, and not to the secondary sons.

The same learned author observes (p. 200):

> Most of the spiritual objects may be attained by a man destitute of male issue, through the instrumentality of other relations, such as the brother's son. But the secular object may be gained only by means of a son real or subsidiary. A man again aims at that Moksha . . . does not require a son and cannot adopt one.

Apart from these opinions, it is clear from some of the Smritis and Nibandhas themselves that the practice of adoption originated in the secular notion of perpetuation of race and supplying the want of a natural son. It is true that there are some passages in Manu which are inconsistent with this view, but a careful study of the text shows the author's own opinion to be in favour of the former view. That also seems to be the opinion of Baudhayana and Vasishtha and Apastamba: (*see* Sarcar's Law of Adoption; Tagore Law Lectures, pp. 44 to 46). Thus the learned lecturer observes at p. 47 as follows:

> There cannot be any doubt left on the mind of a reader after perusing the above passages, that the doctrine of spiritual benefit, instead of being the foundation of the institution of subsidiary sons, was on the contrary invoked for the very purpose of suppressing it by declaring these sons to be useless to their temporal fathers in a spiritual point of view.

Jains and other Hindu dissenters do not attach any importance to the Brahminical theory of the importance of sons for spiritual purposes and do not perform or believe in the sraddha ceremonies and yet it is well-known that they recognize adoption, and it seems, therefore, that the usage of adoption did not owe its origin to the religious belief that a son is necessary for the salvation of man. The observations of the Privy Council in 3 I A 154[1] are pertinent on this point. Their Lordships observed as follows (p. 193):

> It may be the duty of a Court of justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it.

In the well-known *Guntur case*(4 I A 1[32]), an adoption was made by a widow with the consent of the sapindas but without the authority of her husband, and it was found that the adopting widow had no apparent anxiety or desire for the proper and bona fide performance of any religious duty to her husband. It was held by the Privy Council that the adoption was good, although the High Court had set it aside on the ground that the act was not done by the widow in the proper and bona fide performance of a religious duty. The reason stated by their Lordships is as follows (p. 14):

> Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the

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[32] Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsaiyya, (1876) 1 Mad 174 =4 I A 1=26 W R 21=3 Sar 669 (P C).

> sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

These authorities certainly support the contention that religious efficacy is not the sole test of the validity of an adoption made by a Hindu widow, and the question now is whether this view was totally discarded in *Amarendra's case.*[4] I can find no warrant for such a view in the judgment in *Amarendra's case.*[4] Their Lordships referred to *Raghunadha's case*[1] as well as to 10 M I A 279[19] and then observed as follows (pp. 251-52):

> But though undoubtedly certain passages in the judgments relied on seemed to suggest that it was the succession to the estate by the son's widow that was the determining factor, and, as was stated by a learned Hindu Judge in 1900, 'the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others' (per Ranade, J. in 25 Bom 306[33]), yet it was never so laid down by the Board in precise terms. The dominant consideration may have been the right of property, and equitable claims may not have been without their influence, but the religious and ceremonial side was not altogether ignored. In *Bhoobun Moyee's case*[19] Lord Kingsdown evidently relied upon the fact that Bhowanee had died at an age which enabled him to perform—and it was to be presumed that he had performed —all the religious services which a son could perform for a father, and he refers to the doctrine of Hindu law that the husband and wife are one, and that in the widow a half of the husband survives.

It may be pointed out incidentally that in *Mt. Bhoobun Moyee's case*[19] the question of "religious side" became material, as the deed, by which the power to adopt was given, expressly referred to it; and that is clear from what Lord Kingsdown referring to the deed observed at p. 309 (of 10 M I A):

> He [Gour Kishore, the father] mentions [in the deed] the objects which induced him to make the deed—religious motives, the perpetuation of his family and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them.

Then, it is nowhere laid down in *Amarendra's case*[4] that in every case of adoption the sole test of the validity of an adoption is religious efficacy or benefit, or that spiritual benefit is the sole test of the validity of an adoption in every case. All that was said was (p. 249):

> Having regard to this well-established doctrine as to the religious efficacy of sonship, their Lordships feel that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man: *see* in this connexion 33 I A 145[34] at p. 153. The Hindu law itself sets no limit to the exercise of the power during the lifetime of the donee, and the validity of successive adoptions in continuance of the line is now well recognized. Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property. But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognized both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has mainly turned.

I have pointed out what was actually decided in the case. I think it is a good rule that opinions or observations in a judgment must be taken to have been used with reference to the actual facts of the case. In my opinion all that was held in *Amarendra's case*[4] was that the "religious or spiritual side" was at least of primary importance in considering the validity of an adoption made by a widow. But I think it is clear from *Amarendra's case,*[4] as will be seen presently from the earlier decisions of the Privy Council also, that even the rule as to the religious benefit has its limits, and that once the power comes to an end it cannot be revived, and any adoption made subsequently would be invalid. Mr. Kane next stressed the rule deduced in *Amarendra's case*[4] from *Pratapsingh's case*[5] and expressed in these words:

> It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption: 60 I A 242[4] at p. 255.

Now it is clear that *Amarendra's case*[4] followed the earlier judgment in *Pratapsingh's case.*[5] Moreover *Amarendra's case*[4] is similar to *Raghunadha's case.*[1] In the latter case the facts were that a zemindar holding an impartible estate in Madras died leaving a brother and his widow. The widow adopted a son to her husband under his authority. On the zemindar's death the estate vested in the brother. The Privy Council held that the adoption was valid and that by the adoption a new coparcener was introduced in the senior line. The adopted son divested the brother and succeeded to the estate as the property was impartible. Therefore the rule above stated which, as Mr. Kane said, is expressed in very wide terms, must be confined to the facts of the case. In the case of a joint family the interest of a coparcener is never stable. It is liable to change from day to day and even from hour to hour; and it is well established that, in cases of joint family property which is partible, an adoption made by a widow of a coparcener would affect the shares of the other coparceners. But I venture to think that these observations of their Lordships in *Amarendra's case*[4] must be taken in conjunction with their observations in the earlier part of the judgment, where it was clearly said that there must be some limit to the exercise of the power of a widow; and all that they observed is this, that it is impossible to hold that the sole test of the validity of an adoption is the vesting or divesting of property.

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[33] Venkappa Bapu v. Jivaji Krishna, (1900) 25 Bom 306=2 Bom L R 1101.

[34] Kannepalli Suryanarayana v. Pucha Venkata Ramana, (1906) 29 Mad 382=33 I A 145=16 M L J 276 (P C).

I shall leave *Amarendra's case*[4] for the moment and pass on to consider at this stage the question as to whether there are any limits to a widow's power to adopt, and, if there are, what is the position when those limits are reached? That there are limits to the exercise of the power of a Hindu widow to adopt a son to her deceased husband has been recognized by the Courts including the Privy Council. This was laid down for the first time in 10 M I A 279.[19] In that case the facts were that one Gour Kishore died leaving a son Bhowanee and a widow Chundrabullee to whom he gave express authority to adopt in the event of his son's death. Bhowanee married, attained his majority and died leaving a widow Bhoobun Moyee but no issue. Chundrabullee then adopted a son Ram Kishore who sued Bhowanee's widow to recover the estate. Their Lordships, dealing with the question as to the validity of the adoption of Ram Kishore, observed that if the deed of authority relied upon was a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good. Then they observed that they were of opinion that at the time when Chundrabullee Debia professed to exercise it, the power was incapable of execution. Then their Lordships gave three illustrations to illustrate how, when the power of adoption was exercised, the power was at an end, and finally held that the power of adoption given to Chundrabullee was at an end, the adoption was invalid and the suit failed. Then comes the oft-quoted passage in the judgment (pp. 311-12):

> If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the textbooks, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested.

After the death of Bhoobun Moyee, Ram Kishore got possession of the property. Now, if his adoption was good, he was undoubtedly the next heir. But the same matter was before the Court in a subsequent suit, and the Bengal High Court upheld the title of Ram Kishore, considering that the Board in the previous case had only affirmed the prior right of inheritance of Bhoobun Moyee, and had not held the adoption to be invalid. The case again came before the Board, 8 I A 229,[20] and the decision of the High Court on that point was reversed. It was contended that all that was decided by the Judicial Committee in *Bhoobun Moyee's case*[19] was that the son adopted by the mother could not recover the estate from the widow of the son, but the Board said (p. 245):

> The substitution of a new heir for the widow was no doubt the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view which the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani (i. e. the son), the power of adoption was at an end, and incapable of execution. And if the question had come before them without any previous decision upon it, they would have been of that opinion.

These two cases were relied upon by the Privy Council in 14 I A 67,[21] in which their Lordships held that an adoption with the permission of sapindas by a Hindu widow to her husband, after her husband's estate had vested in his son's widow, was invalid on the ground that the survival of the son's widow and the vesting of the estate in her put an end to the right of the first widow to adopt. With regard to the passage from *Pudma Coomari's case*[20] which is cited above, their Lordships observed as follows (p. 70): "Nothing can be clearer or more explicit than the language used by the Committee in that case."

In 17 Bom 164[35] the same question arose in a different form. There, a Hindu died leaving a widow and a son, and the son died childless leaving his widow, who then died. Upon her death, her mother-in-law succeeded as heir and thereafter adopted the plaintiff to her deceased husband. The latter filed a suit to recover certain property on the strength of his adoption. The High Court, following the Privy Council cases, held that the adoption was invalid. This case was followed in turn by a Full Bench of this Court in 26 Bom 526[30] where it was held that, where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural-born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived. The judgment of the Court was delivered by Chandavarkar, J. and the learned Judge has critically examined *Bhoobun Moyee's case.*[19] With regard to this case, the learned Judge observed as follows (p. 529):

> One point is indeed beyond all dispute, viz., that in their Lordships' opinion a widow's power to adopt is limited. In *Bhoobun Moyee's case*[19] the judgment starts with that proposition as the law.

Then he referred to *Thayammal's case*[21] and rejected the argument that the power of a widow may only be suspended so long as the estate is vested in others, but directly it comes to her from those others it is revived, in these words (pp. 529-30):

> The language of the judgment in *Bhoobun Moyee's case*,[19] however, is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption and that once that limit is reached the power 'is at an end'. That language is repeated and emphasized by their Lordships in their judgments in *Pudma Coomari's case*[20] and in *Thayammal's case.*[21]

Then the learned Judge followed *Hasabnis' case*,[35] and finally he observed as follows (p. 532):

> In the view we take of the law as laid down by the Privy Council—viz., that a widow's power of adoption comes to an end and can never be revived after the inheritance has vested in some heir of her son other than the widow herself—it is immaterial whether the estate which she takes when the inheritance comes to her after that vesting is absolute or limited.

This case has been approved by their Lordships of the Privy Council in 45 I A 156[28] and in *Amarendra's case.*[4] I have already referred to their Lordships' observations on this question in *Pratapsingh's case.*[5] In *Amarendra's case*,[4] Sir George Lowndes' observations on this point are at p. 249, which I have already referred to. These cases establish the principle that there are limits to the power of a widow to adopt, and once the power is at an end by the vesting in an heir of the son whether natural or adopted other than the adopting widow, it does not revive on the death of such an heir, even when the estate has come back to the adopting widow and even when by adoption she would be merely divesting her estate, because the power having come to an end is for ever incapable of execution and is not merely suspended during the period the estate is vested in the heir. In 33 Mad 228,[36] the Madras High Court has held that the power of a widow of a pre-deceased coparcener to adopt is at an end once the estate has vested in the widow of the last coparcener. The question, therefore, is, what are those limits? Mr. Kane says that the only limits to a widow's power to adopt are those laid down in the Full Bench case, to which I have referred, and he relies upon a passage in *Pratapsingh's case*,[5] where it is observed that the circumstances under which the power would be at an end are indicated in *Bhoobun Moyee's case*[19] and in *Thayammal's case.*[21] I am unable to agree, and I see no reason or principle why the Courts, in giving effect to the rights of parties before it, cannot hold in any particular instance that the power was at an end. In *Amarendra's case*[4] the principle that equitable consideration can terminate a widow's power is clearly recognized, and so also in *Pratapsingh's case.*[5] On this point Mr. Mayne observes at p. 153 as follows:

> It is true that there is no limit of time within which a power of adoption must be exercised. Nor is there any rule of law by which the right of a widow to make successive adoptions is limited, so long as such a limitation is not to be found in

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[35] Krishnarav Trimbak Hasabnis v. Shankarrav Vinayak Hasabnis, (1892) 17 Bom 164.

[36] Adivi Suryaprakasa Rao v. Nidamarty Gangaraju, (1909) 33 Mad 228=4 I C 386.

the terms of the authority itself. The basis of the rule is to be sought not in the ancient texts, which contain no traces of such a restriction, but in those considerations of expediency by which our Courts have been guided so as to avoid frequent disturbances of vested titles.

The object of adoption is to perpetuate the line and to have an heir who would succeed to the property. It is true that it is held in *Amarendra's case*[4] that spiritual efficacy is a primary consideration, but the importance of other considerations is not overlooked and other considerations also have weighed with the Courts, which have to administer not only law but equity, and cannot be ignored. If the grandmother in *Ramakrishna* v. *Shamrao*[30] could not adopt, it is difficult to see on what principle the widow of a more distant collateral, who was a member of the family, could adopt so as to disturb the rights, which under the Hindu law a widow as the heir of her husband has acquired. As Mayne observes, there is very little to be found in the texts bearing upon the question as to how far the unlimited power, now recognized to be inherent in the widow of a member of a joint family to adopt, is limited by considerations of the effect of such power on the property involved or on the rights thereto either by survivorship or by inheritance, and the law on the subject is the growth of judicial decisions of the Courts. If there is no property, there would be no litigation as to the validity or invalidity of an adoption made by a widow. A poor man has also a soul to save but one does not hear of an adoption made by him or his widow. As I put it to Mr. Kane in the course of argument, a pauper's widow, herself a pauper, may make an adoption to her husband, if she finds somebody willing to give a boy in adoption to her so as to protect her husband's soul from *put*, and no one would be the wiser for such an adoption. The trouble arises when a question is raised as to the rights of other persons to property which, by right of adoption, ought to go to the adopted son, and commonsense and equity demand that some limit must be put upon this unfettered and wide power of a widow to adopt, so as to avoid confusion of titles. Security of tenures and title in the modern complexity of life makes this necessary, and this principle has clearly been recognized. Thus, as observed in *Amarendra's case*[4] in explaining *Bhooban Moyee's case*,[19] the dominant consideration present to the mind of the Board in *Bhooban Moyee's case*[19] was of property, or what may be called the rights of property. It is with this object that the Courts have laid down the principle that the power may be at an end and extinguished. It is true, that in some cases it is broadly said that the power is at an end the moment there is somebody surviving as an heir to carry out the religious injunction to perpetuate the lineage. But would this always satisfy the strict view of the text and the strict notions of Hindus ? I respectfully venture to think not. Thus, to take a simple case: If *A* dies leaving a widow *B* and a son *C*, and *C* then dies leaving his own widow *D* and *D* dies without making an adoption to her husband, and *B* succeeds to the property as the mother of *C*, it is clear on the authorities to which I have referred that she cannot adopt and her power is at an end (*Krishnarav* v. *Shankarrav*[35]). But would this satisfy the text of Vasishtha that there is no heavenly region for a sonless man ? If you ask *B*, she would say most emphatically "No". Yet that is the law. *Ex hypothesi* there is no one to perpetuate the lineage or to offer the *pindas* to the departed males. Why cannot *B* be allowed to adopt ? I only mention this instance to show that even the spiritual need must be left to look after itself sometimes, and that is how the Courts have come to establish the doctrine of the extinguishment of a Hindu widow's power to adopt.

So far I have dealt with the case of an undivided family. The result of the authorities as to the impartible estate is that the fact that the estate has passed to a collateral heir by survivorship in a joint impartible zemindari does not terminate the power of adoption given by the last zemindar who held an indefeasible estate, the succession being only of provisional character and subject to defeasance by the emergence of a male heir to the latter: *see* the observations of Seshagiri, J. in 49 I C 929.[37] This is supported by the observations of the Privy Council in 45 I A 156[28] at p. 160. The cases I have referred to would also seem to establish that there is a distinction between estates vesting by inheritance and by survivorship. The vesting of an estate in coparceners does not put an end to the power of a widow of a predeceased coparcener to adopt a son to her husband, the principle being that the coparceners take the estate temporarily merely to prevent the ownership from being in abeyance pending the widow introducing an heir by adoption exactly as if she was *en ceinte* (34 I A 107[29]). But on partition among coparceners, or when the joint family property has devolved by succession on the heir of the last surviving coparcener (*Chandra* v. *Gojarabai*[2]), or after it has passed out of the hands of the sole surviving coparcener by sale or mortgage or gift made by him (52 Mad 398[38]), the adoption will not be valid and the adopted son does not become a coparcener, for in these cases coparcenary property will be no longer in existence and there can be no question of vesting or divesting of the property in or by the adopted son. The general rule established by *Bhooban Moyee's case*[19] and in *Raghunadha's case*[1] is that a widow cannot adopt if the effect of the adoption is to divest the estate vested in a person as an heir and not by survivorship. The principle underlying the decisions is that if the estate is vested in a person other than the adopting widow, her power is gone for ever, and any adoption made by her is void. There is another principle of Hindu law which has an important bearing on this point, which has now to be considered. As pointed out by their Lordships of the Privy Council in *Bhooban Moyee's case*,[19] the rule of Hindu law is that in the case of inheritance a person to succeed must be the heir to the last full owner. After mentioning the rule, their Lordships observed at pp. 311-12 (of 10 M I A) as follows :

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[37] Jagannadha Gajapali v. Kunja Bihari Deo, A I R 1919 Mad 447=49 I C 929.

> In this case Bhowanee Kishore was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of Bhowanee Kishore.
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> If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule ; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession can be defeated or divested.

In his valuable work, Mayne has summarized the principles of succession in case of males. After pointing out that as long as the joint family continued, the property passed by survivorship, he says at p. 724, as follows :

> But the rule of survivorship still governed the devolution of the share where a coparcener left no near heirs, and determined its amount. When, however, property came to belong exclusively to its possessor, either as being his own self-acquisition, or in consequence of his having separated himself from all his coparceners or having become the last of the coparcenary, then it passed to his heir properly so-called. It must always be remembered, that the law of inheritance applies exclusively to property which was held in absolute severalty by its last male owner. His heir is the person who is entitled to the property, whether he takes it at once, or after the interposition of another estate. If the next heir to the property of a male is himself a male, then he becomes the head of the family, and holds the property either in severalty or in coparcenary . . . . . as the case may be. At his death the devolution of the property is traced from him. But if the property of a male descends to a female, she does not, except in Bombay, become a fresh stock of descent. At her death it passes not to her heirs, but to the heirs of the last male holder. And if that heir is also a female, at her death, it reverts again to the heir of the same male, until it ultimately falls upon a male who can himself become the starting point for a fresh line of inheritance.

Then the learned author further states as follows (p. 725) :

> The right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot in any circumstances remain in abeyance in expectation of the birth of a preferable heir, not conceived at the time of the owner's death. A child who is in the mother's womb at the time of the death is, in contemplation of law, actually existing, and will, on his birth, divest the estate of any person with a title inferior to his own, who has taken in the meantime. So, in certain circumstances, will a son who is adopted after the death. But in no other case will an estate be divested by the subsequent birth of a person who would have been a preferable heir if he had been alive at the time of the death.

In Bombay, the Courts have always favoured a literal acceptance of the text of the Mitakshara as to devolution of a woman's property at ii., II, Ss. 8 and 9, and have held that a woman taking as heir to her son or grandson possessed no more than what is known as a widow's estate, which reverted to the heirs of the last male holder. It has also been held by the Bombay Courts that all the women, like mother, grandmother, etc., who belonged to the family by marriage and not by birth, took only a limited estate in the property which they inherited from a male member : 36 Bom

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[38] Veeranna v. Sayamma, A I R 1929 Mad 296=118 I C 821=52 Mad 398=56 M L J 401.

546,[39] 32 Bom 26.[40] Female heirs in Bombay are divided into two classes. Those who by marriage have entered into the gotra of the male whom they succeed take an estate similar to that of a widow. Those who are born in the gotra of the deceased owner, but who upon their marriage will become of a different gotra from that of the last male owner, take absolutely. Under the former head fall a widow, mother, grandmother, etc., and the widow of a sapinda succeeding under circumstances similar to those in which Mankuvarbai succeeded in 2 Bom 388,[41] (affirmed in) 7 I A 212.[42] Under the latter head are ranked, a daughter, sister, niece, grand-niece, father's sister, and the like. In Bengal, on the other hand, even in the case of a joint family the right of a co-sharer does not pass over upon his death to the other co-sharers. It is part of his estate and devolves upon his legatees or natural heirs including his widow.

These principles, in my opinion, show that in Bombay the position in the case of a joint family is different from that in the case of a separated Hindu. That seems to be the reason why it was held by this Court that the widow can adopt if the estate is vested in her, but is incapable of adopting unless she has the consent of other coparceners, or she adopts under an express authority from her husband. This view now goes by the board after the decisions in *Bhimabai's case*[3] and in *Amarendra's case*.[4] But if I am right in holding that those cases were cases in which the rights of the parties had to be determined on the footing of there being a joint family, where in one case the property devolved by survivorship and in the other, having regard to its nature by inheritance, then it is clear that when a joint family has come to an end and the coparcenary is extinct as here, the question does not arise. When the property comes into the hands of a sole surviving coparcener, he holds it as a separate householder. He is competent to dispose of the whole property by an alienation or sale, of course, subject to the rights of maintenance of any of the widows alive in the family, and on his death the property would pass as separate property by inheritance to his heir as beneficial owner of it : 6 M I A 309.[43] In this connexion, I would refer to the remarks of the Privy Council in *Mt. Bhoobun Moyee's case*[19] at p. 310 (of 10 M I A) :

> In this case, Bhowanee Kishore had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir ; he had full power of disposition over it ; he might have alienated it ; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

If the heir is his widow, then under the principles to which I have referred, she would take a widow's estate, and on her death succession would go to the next heir of the last full owner. If, on the other hand, she is a female who has not entered into the family by marriage but passes out of the family by marriage into another family, she takes the property absolutely and becomes a fresh stock of descent herself. Unfortunately these principles have not always been kept in mind. Great reliance is placed upon the principle deduced by the Board in *Amarendra's case*[4] from the decision in *Pratapsing's case* [5] which I have set forth above. But all that is said there is that the vesting of property in another person cannot be in itself the test of the continuance or extinction of the power of adoption. In my humble opinion, this observation must be taken to be made with reference to the actual facts of the case. In the first place *Yadao* v. *Namdeo*[6] was a case where the adoption was made during the lifetime of a coparcener by the widow of another coparcener. In *Pratapsingh's case*[5] the position was exactly the same. Both the cases were cases of a joint family. In the one, property went by survivorship ; in the other, by reversion. In *Amarendra's case*[4] there was no custom pleaded similar to that in *Pratapsing's case*[5] to contend that in the event of a member of the junior family to whom lands were given for maintenance dying childless, the property would revert to the senior branch of the family. But it is clear from *Amarendra's case*[4] that the claim of Banamalai in that case was put, and was understood by the Board, upon the ground that he was the nearest reversioner. The Board in summarizing the pleadings observed on this point as follows (p. 245):

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[39] Dhondi v. Radhabai, (1912) 36 Bom 546=16 I C 343=14 Bom L R 569.

[40] Vrijbhukandas v. Bai Parvati, (1907) 32 Bom 26=9 Bom L R 1187.

[41] Lallubhai Bapubhai v. Mankuvarbai, (1876) 2 Bom 388.

[42] Lulloobhoy Bappoobhoy v. Cassibai, (1880) 5 Bom 110=7 I A 212=7 C L R 445=4 Sar 164 (P C).

[43] Nagalutchmee Ummal v. Gopoo Nadaraja Chetty, (1856) 6 M I A 309=1 Sar 543 (P C).

> The parties are agreed that if the custom is established and the adoption inoperative, Banamalai was entitled to the estate as the nearest reversioner.

Then the judgment starts with the following sentence (p. 244):

> The issue involved is as to the right of succession (using the word in its widest significance) to the Dompara Raj. . . . .

The case before their Lordships was a case of a separate zamindari estate, where, in the absence of a custom similar to that set up in *Pratapsing's case*,[5] succession would go as if it was coparcenary property, having regard to its nature, in favour of the last surviving coparcener, that is by inheritance. Now, it is a well recognized rule, as Mayne points out, that in Hindu law there is no such thing as succession properly so-called. It is either survivorship or inheritance, or reversion where there is a custom in support of it. Therefore, in the passage set out above the first two cases were cases of survivorship and reversion, and then their Lordships said that the same rule would apply if property was taken by inheritance. This latter opinion, which certainly could not be deduced from *Yadao* v. *Namdeo*[6] or *Pratapsing's case*,[5] laid down a proper principle upon the facts before the Board, and must be confined, in my opinion, to the actual facts of the case; and I do not think it was intended by the Board to lay down broadly that in all cases, and at all times, when the property has passed by inheritance, the widow's power to adopt could be exercised to the detriment of the heir as such, or that the adoption would be valid. The zemindary before them was the separate property of Bibhudendra, but the principles of succession in the broad sense applicable to the case of a coparcenary would apply; and though in one sense the heir takes by inheritance, it is clear that he does so as a coparcener or as a member of the family. In such cases of zemindary estate, where the property was separate, as I have pointed out, even nearer heirs are excluded, and only the eldest in the senior line takes the estate; and all principles of inheritance do not apply as if the property was the separate property of a separated Hindu, where the property is partible. In my opinion therefore the observations should be limited to the facts of the case, if one is not to exclude altogether the rule of Hindu law that succession can never be in abeyance, and when it opens, the nearest heir takes the property and becomes a fresh stock of descent except, of course, in the case of a widow of the last surviving coparcener who, by reason of the fact that her husband was the last owner, succeeds him as an heir. In such cases therefore, in my opinion, it is difficult to see why it cannot be said that the limits are reached, the power is at an end, and the adoption is invalid. As I have pointed out, from the illustration which I have given, *A* dies leaving a son and a widow, and the son dies leaving his own widow, and the latter dies without making any adoption, it is clear on the authorities that the mother succeeding to the son cannot make a valid adoption: 48 Bom 492,[44] and if the principle of spiritual efficacy is the sole test of the validity of an adoption, then it is difficult to see why in such a case the mother cannot make a valid adoption. Similarly, and on the same principles, it seems to me that in this case the limits were reached when Shiva died leaving his own widow, who remarried without making an adoption. She was then dead for all practical purposes from the point of view of spiritual efficacy to the joint family; and if Shiva's mother could not have adopted to her own husband, it is difficult to see why a widow of a more distant coparcener should be permitted to make an adoption. It is obvious that if this is not the correct view to take, complex questions as to rights of property would arise and would be involved.

It is argued by Mr. Kane that the only limits laid down by the Privy Council as to the termination of a widow's power to adopt are those laid down in *Ramkrishna* v. *Shamrao*[30] and that case has been approved by the Privy Council in *Amarendra's case*[4] and as part of the same contention he says that a coparcenary or joint family is not extinct as long as there is a widow of a deceased coparcener alive who can by adoption revive the family, and he relies in this respect upon *Pratapsing's case*.[5] It will be convenient to deal first with the argument that as long as widows are alive, the joint family

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44. Anjirabai v. Pandurang Balkrishna, A I R 1924 Bom 441=80 I C 185=48 Bom 492=26 Bom L R 326.

continues and is not extinct, and I cannot do better than refer to Mayne to point out the distinction between a joint family and a coparcenary. At p. 344 Mayne says as follows:

> It is evident that there can be no limit to the number of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the distance of their relationship from each other. But the Hindu coparcenary, properly so called, constitutes a much narrower body. When we speak of a Hindu joint family as constituting a coparcenary, we refer not to the entire number of persons who can trace from a common ancestor, and amongst whom no partition has ever taken place; we include only those persons who, by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burthen it with their debts, and at their pleasure to enforce its partition. Outside this body there is a fringe of persons who possess inferior rights such as that of maintenance, or who may, under certain contingencies, hope to enter into the coparcenary.

Then, at pp. 344-45, he observes:

> There is no such thing as succession, properly so called, in an undivided Hindu family. The whole body of such a family, consisting of males and females, constitutes a sort of corporation, some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance.

Therefore a coparcenary is a body which is clearly distinct from the general body of the undivided family, and it is not every male who may have descended from a common ancestor, who is still alive, can be said to be a coparcener. Suppose the property to have all descended from one ancestor, who is still alive, with five generations of descendants. It by no means follows that on a partition every one of these five generations will be entitled to a share. The answer to the question as to who are coparceners is that they alone are coparceners who have taken an interest in the property by birth: 10 Bom H C R 444.[45] What Telang, J. pointed out in *Chandra* v. *Gojarabai* [2] was that the coparcenary was extinct and the only members of the larger corporation were two widows, who, of course, cannot be called coparceners. Mr. Kane relies upon a passage in West and Buhler, which is referred to by the Privy Council in *Pratapsing's case.*[5] It is true that in that passage West and Buhler observed that the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by the adoption impossible. In the first place, this is a foot-note to the section the heading of which is: "Adoption by a widow—not to defeat a vested estate". Then the foot-note is to the observation made by the authors in these words:

> In the case of cosharers standing on an equal footing the Indian lawyers certainly do not recognize any obstacle to adoption by the widow of one as arising from the estate on his death having vested in the other.

Therefore the passage and the foot-note merely mean this that where there is a coparcenary, the widow of a coparcener can continue her hunband's line though the property has passed by survivorship to other coparceners or is held by the last surviving coparcener. As Telang, J. observed in *Chandra* v. *Gojarabai* [2] that Bhau's widow could have adopted during Nana's lifetime, in the present case Bayaji could have validly adopted defendant 1 as her son before Shiva died. As a matter of fact, West and Buhler (Hindu Law, Vol. 1, Edn. 3) lay down the same principle in these words (p. 994):

> A right in possession is kept alive by the widow's constant capacity to adopt, so as to blend an additional element retrospectively with the united family, but a mere possibility once extinguished cannot be revived. Thus adoption in a separated branch cannot divest the estate which the law gave to the then nearest collateral, and which has passed unshared to him who has it. But within a group of united brethren the widow of one may adopt so as to divest an estate wholly or in part.

I do not think therefore that this foot-note supports Mr. Kane's argument. The true rule therefore must be that if the widow's power is at an end, then any adoption made by her is invalid, and I do not think that the only limits which terminate the power of a widow to adopt are those mentioned either in *Bhoobun Moyee's case*[19] or in *Ramkrishna* v. *Shamrao.*[30] The observations of Mr. Ameer Ali in *Pratapsing's case* [5] at p. 108, to which I have referred, are clearly to the contrary as are those of Sir George Lowndes in *Amarendra's case*[4] which also I have cited above. In my opinion when the coparcenary has become extinct by the death of the last surviving coparcener and the estate has passed by inheritance to his heir as in *Chandra* v. *Gojarabai,*[2] the power of any widow of a predeceased coparcener is at an end, and I am unable to hold that *Amarendra's case*[4] lays down any contrary rule. *Chandra* v. *Gojarabai*[2] was not referred to in *Amarendra's case.*[4] On the other hand it was expressly referred to in *Bhimabai's case*[3] and carefully distinguished from the facts in *Bhimabai's case.*[3] It was pointed out by Sir Dinshaw Mulla in *Bhimabai's case*[3] that in *Chandra* v. *Gojarabai,*[2] Telang, J. held the adoption to be invalid. Then his Lordship quoted the reason given by Telang, J. for this conclusion. His Lordship then indicated how the facts in *Bhimabai's case*[3] were different, and proceeded to observe at pp. 40-41 (of 60 I A):

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[45] Moro Vishvanath v. Ganesh Vithal, (1873) 10 Bom H C R 444.

> But Nilkanthagouda was not the sole surviving coparcener at the date of his death which, according to the decision cited above, would be the material date. Nor did the estate pass to Dyamangouda by inheritance as his heir. The coparcenary at the date of Nilkanthagouda consisted of himself and Dyamangouda, and the estate passed to Dyamangouda by survivorship. The adoption of appellant 2 was not made after the extinction of the coparcenary, but during its subsistence, the last surviving coparcener being Dattatraya. Their Lordships are therefore of opinion that the principle of the decision mentioned above does not apply.

This brings me now to the recent Bombay cases, to which we have been referred, and upon the decisions in which some of the questions referred to us have been raised. The first case is 37 Bom L R 193.[8] The facts there were: A joint Hindu family consisted of a father and two sons. The elder son died leaving a widow; thereafter the father died, and after his death his younger son died leaving his widow. Thus there were two widows in the family, of whom the widow of the elder son made an adoption. Thereupon the widow of the younger son, in whom the estate had vested as an heir to her husband, brought a suit for a declaration that the adoption was invalid, and for possession of the property. Shingne, J., held that *Chandra* v. *Gojarabai*[2] was not overruled by the recent Privy Council decisions, and therefore the adoption was invalid, and the plaintiff was entitled to succeed. I respectfully agree with that judgment; and in my opinion that was the correct view to take on the facts.

The same point arose before my brothers Broomfield and Macklin, JJ., in 37 Bom L R 786.[9] There, the facts were that there was a joint family consisting of three brothers—Ramrao, Subhanrao and Vishwasrao. They had a step-brother Ganpatrao who was however separate from them. Of the three brothers, Ramrao died first, and then Subhanrao. So that Vishwasrao became the last full owner. Upon the findings it was held that Vishwasrao had died. Thereafter, Ramrao's widow adopted one Vinayak. She remained in possession of the property till her death in 1928. It will be seen from these facts that upon the death of Vishwasrao legally the estate vested in the step-brother Ganpatrao. After the death of Ramrao's widow, the plaintiffs who were the grandsons of Ganpatrao, brought a suit for possession of the property, alleging that the adoption of Vinayak by Ramrao's widow Sakhubai was invalid and of no effect. The Subordinate Judge held that the adoption was invalid, but dismissed the suit on the ground that the claim was barred by limitation. On appeal, the question of the validity of the adoption was not raised, but on the question of limitation the Assistant Judge held that the claim was not time-barred, and decreed the suit. Defendant 4, the representative of the adopted son, brought a second appeal. It was held by the Court that the adoption was valid, that *Chandra* v. *Gojarabai*[2] however was not overruled, and that therefore the adopted son could not divest the estate which had already vested in the step-brother. Broomfield, J. dissented from the view taken by Shingne, J., in *Vishnu* v. *Lakshmi.*[8]

It is beyond doubt that adoption has the effect of transferring the adopted boy from his natural family into the adoptive family and it confers upon the adoptee the same rights and privileges in the family of the adopter as a legitimate son. The only cases in which an adopted son is not entitled to the full rights of a natural-born son are: (1) where a son is born to the adoptive father after adoption, in which case on a partition the share of the adopted son is smaller than that of the natural son; and (2) where he has been adopted by a disqualified heir. There are also some restrictions on the adopted son as to marriage and as to his power to make an adoption from his natural family. Naturally he loses all the rights of a son in his natural family including the right to claim any share in the estate of his natural father or natural relations or any share in the coparcenary property of his natural family. There is no authority as far as I know for the view that an adoption would be valid, and yet the adopted son would not be entitled to succeed to the property to which if there was a natural son of the adoptive father, the latter would have succeeded, and logically it seems to me the position is inconsistent; but there is clear authority for the opposite view.

In *Bhoobun Moyee's case*,[19] Gour Kishore died leaving a son Bhowanee and a widow Chundrabullee Debia, to whom he gave authority to adopt in the event of Bhowanee's death. Bhowanee died at the age of twenty-four without issue, but leaving a widow Bhoobun Moyee, who succeeded by inheritance to his property. Chundrabullee then adopted Ram Kishore, who sued Bhoobun Moyee for the recovery of the estate. It was held by the Board that his claim failed. After the death of Bhoobun Moyee, Ram Kishore got possession of the property, and if his adoption was good he was undoubtedly the next heir. His title however was disputed by a distant collateral, and the validity of his adoption was the subject of another suit. The Calcutta High Court held that the effect of the Privy Council decision in *Bhoobun Moyee's case*[19] was that the adoption was good, but that the estate could not be divested. In appeal to the Privy Council (*Pudma Coomari's case*[20]), their Lordships held that their decision in *Bhoobun Moyee's case*[19] was misunderstood by the Calcutta High Court, and they reversed the Calcutta High Court's decision, making it clear that what they had decided in *Bhoobun Moyee's case*[19] was not merely that a vested estate could not be divested, but on that account no adoption which had that effect could be valid, as the power to adopt was at an end and incapable of execution. I have quoted above their Lordships' observations.

In *Pratapsing's case*[5] the High Court had held that though the adoption was good for spiritual purposes and for inheritance of any private property of Kaliansing the circumstances of the case were such that the defendants had to prove that it divested the estate which had passed to the reversioner, and they therefore held that the adopted son did not divest the estate which passed to the Thakur by the custom of reversion. In appeal to the Board, the appellants' argument was that the adoption divests any estate which would have been divested by a posthumous son. On behalf of the respondents it was argued that the rights of an adopted son date from his adoption and they do not relate back as though he were a posthumous son. Mr. Ameer Ali's observations on this point are at p. 106 which I have already set forth above. The same view was taken in *Thayammal's case.*[21] In *Thayammal's case*[21] it was argued that the adoption itself might be perfectly good though it was ineffectual against the person in possession. This view was rejected by the Board who treated the adoption as invalid for every purpose. It seems to me to be clear upon these authorities, that the distinction made by my brother Broomfield, J. is not warranted either upon any principle of Hindu law or upon any judicial decision. I would therefore most respectfully dissent from that view.

The next case is 38 Bom L R 94.[10] There, a joint Hindu family consisted of an uncle and a nephew. The nephew had a sister. The uncle died first and was followed by the nephew. Upon that, it is clear that the estate would vest in the nephew's sister. The uncle's widow gifted away a portion of the estate to the defendant and then adopted the plaintiff. The plaintiff brought a suit to recover possession of the property which had been gifted away by his adopting mother before his adoption. The trial Court dismissed the suit on the ground that the adoption was not valid. The plaintiff appealed to the High Court. It was held by this Court that the adoption was a valid adoption, but it could not divest the estate vested in the nephew's sister. On behalf of the respondents Mr. Kane, who has argued this case before us, argued as follows (p. 96) :

> We do not admit that the widow could make a valid adoption in this case, but even if she could, it is enough for us to contend that the adoption cannot have the effect of divesting the estate which vested after the husband's death in his joint nephew by survivorship, and after the latter's death in the latter's sister by inheritance and succession, before the adoption took place.

Sen, J., who delivered the judgment, held that the adoption was valid, but it could not divest the estate which had vested in the nephew's sister. In referring to the respondents' argument, Sen, J. made another distinction which, I venture to think respectfully, has no support from any decided case. This is what the learned Judge observed (p. 99) :

> This, it is contended, is not a case of property devolving by survivorship, as the plaint property

on Nivritti's death, went by rules of succession to his sister Banu; and the argument is that on the date of adoption the property in question having already been inherited by Banu, and the adopted son, being a more distant heir to Nivritti than Banu, viz., an uncle's son, could not claim the said property.

All that Mr. Kane argued in that case was that he did not admit the adoption was valid, but, even if it was valid, upon the authority of *Chandra* v. *Gojarabai*,[2] it could not divest the estate. It is not clear whether the decision that the adopted son could not divest the estate vested in the nephew's sister was based upon *Chandra* v. *Gojarabai*,[2] though the case is referred to and noticed in the judgment. With all respect to the learned Judge, I am unable to agree that the adoption in that case was valid if *Chandra* v. *Gojarabai*[2] was good law, or that the adoption being valid it could not divest the estate vested in the nephew's sister on the ground that the adopted son was a more distant heir to the nephew than his own sister, and I think respectfully that the decision that the adoption was valid is wrong. The next case to notice came before the same Judges. It is the case in 38 Bom L R 100.[11] There the facts were, one Rajaram had a son Bhagwant and a daughter Nani. Bhagwant died during the lifetime of his father leaving a widow Umabai. Thereafter, the father Rajaram died, leaving him surviving his widow Krishnabai and, of course, Nani and Umabai, the widow of the pre-deceased son.

This happened in 1915. The property clearly under the Hindu law vested in Krishnabai as the heir of Rajaram, who was the last full owner. She died in 1923. In 1927 Umabai adopted a son Murlidhar. After the adoption Nani sued for a declaration that she was the legal heir of Rajaram and that the adoption of Murlidhar was illegal, and for possession of the property. It is clear that on the death of Krishnabai succession opened, and Nani became the owner as the nearest heir to Rajaram from whom succession had to be traced. Nani succeeded in the trial Court. Umabai and the adopted son appealed to this Court. It was held that the adoption was valid, and that the adopted son was entitled to the estate in preference to Nani. Now, logically, if the adoption is valid, then the judgment is right; but I respectfully dissent from the view taken that the adoption was valid, for the reasons which I have already given.

In my opinion, the confusion seems to be due to ignoring the principles to be gathered from the decided cases. These are very clearly set forth in Mulla's Hindu Law; and having regard to the importance of the subject, I make no apology for summarizing them here. In S. 471 at p. 530, the learned author deals with the subject "Termination of widow's power to adopt". He first deals with the case of a separated Hindu dying. He then refers to *Bhoobun Moyee's case*,[19] *Pudma Coomari's case*[20] and *Ramkrishna* v. *Shamrao*.[30] In sub-s. (3) he observes as follows :

> The power to adopt, once it comes to an end, becomes extinguished for ever, and it does not revive even when, on the death of the son's nearer heirs, the estate reverts to the widow and becomes vested in her.

In S. 472 the learned author lays down an additional rule where the husband was not divided at the time of his death. In that section he first considers the case where the husband was a member of a joint family at the time of his death, and he observes that where the widow had a son, natural-born or adopted, and he died leaving a wife, child or other heir nearer than the widow, then the widow's power was at an end. Then the learned author considers the case where the family ceases to be joint, that is where the joint family property has passed by succession from the sole surviving coparcener to his heirs such as his widow, in which connexion he refers to the case—which he calls the leading case—of *Chandra* v. *Gojarabai*.[2] Then he quotes the statement of the Judicial Committee in *Bhimabai's case*,[3] which I have already set forth, and deduces the principle that the adoption in such a case would be invalid. In Part 6 of the same chapter the learned author deals with the subject "Divesting of estate on adoption by widow". Broomfield, J., in his judgment has apparently given an extract from the preliminary note made by the learned author, but, with respect, he has not noticed the observation of the learned author that the subject matter of S. 502, which occurs in this part of the book, is connected with that of S. 471, namely, "Termination of widow's power to adopt," as to which the learned author says: "The two sections relate to the same subject in different forms". In S. 501 the learned author says :

> A valid adoption by a widow, if her husband was divided at the time of his death, may divest an estate of inheritance. It may, if her husband was a member of a joint family governed by the Mitakshara law, divest rights acquired by survivorship.

Then he says: "The question what estate of inheritance is divested by adoption is dealt with in Ss. 502 and 503". S. 502 deals inter alia with the case where the husband was divided at the time of his death. In that case, a valid adoption by a widow divests the following estates, and vests them in the adopted son. There are three cases given by the learned author, and they are as follows:

> (i) The estate of her husband which vested in her on his death as his heir. . ; (ii) The estate of her son which vested in her on the death of the son leaving her (his mother) as his nearest heir . . . (iii) The estate of her husband which vested in a co-widow jointly with her, whether the co-widow was a consenting party to the adoption or not. . . But where a Hindu dies leaving two widows, *A* and *B* and a son by *B*, an adoption by *A* after the son's death cannot divest *B* of the estate which became vested in *B* on the death of her son.

The general principle is laid down in these words:

> In other words, it may be said, omitting for the present the exceptional case of co-widows, that adoption by a widow cannot divest any estate of inheritance, unless the estate is at the time of adoption vested in the adopting widow: (a) either as her husband's heir, (b) or as the heir of her son dying without leaving any wife, children, or other heir nearer than herself (his mother).

Sub-section (2) is in these words:

> If the estate is vested in a person other than the adopting widow . . . or if it is vested in the adopting widow not as the immediate heir of her son, but as his heir after the death of a nearer heir of the son . . . the adoption will not have the effect of divesting the estate.

The questions raised in this case are not free from difficulty, but upon the whole I have reached the conclusion that the adoption in this case is invalid. Mr. Kane, who has argued this case with great ability, stated that before the referring Bench he contended that, having regard to the recent Privy Council decisions, the adoption was valid, and that was the only contention which he had advanced. Mr. Kane is supported by the observations of Divatia, J., at p. 5 of the referring judgment. It is in these words:

> Mr. Kane invokes the principle in his favour and contends that the adopted son takes the property as a natural-born son in the joint family and his being a nearer or remoter heir of the last coparcener is irrelevant.

The learned Judges, however, referred questions 2 and 3, having regard to the recent Bombay decisions, which I have discussed above. The principles then which I gather from the decisions discussed above are as follows: (1) Where the family is joint and undivided, a widow of a coparcener can make a valid adoption to her deceased husband without the consent of the surviving coparceners, unless she was prohibited either expressly or impliedly by her husband from making an adoption and unless her power is at an end. (2) A widow of a separated Hindu can always make a valid adoption to her husband unless prohibited expressly or impliedly by her husband and unless her power to adopt is at an end. (3) Where the coparcenary is extinct and the estate of the last surviving coparcener has passed by inheritance to his heir, the power of a widow of a predeceased coparcener to adopt a son to her husband is at an end and she cannot make a valid adoption to her deceased husband. (4) There are limits to the exercise of the power of a widow to adopt a son to her husband, and when those limits are reached, the power is at an end and can never be revived. (5) Succession can never be in abeyance except in the case of a widow in a joint family who is *en ceinte* at the time of the death of the last coparcener. The nearest heir succeeds as beneficial owner and becomes a fresh stock of descent, except in the case of those widows who take a widow's estate only. (6) *Chandra* v. *Gojarabai*[2] is not impliedly overruled by the recent Privy Council decisions and is still good law. (7) If the adoption is valid, it is valid for all purposes, and the adopted son has all the rights of a posthumous son. I would, therefore, answer the first question in the affirmative. The adoption in this case, therefore, is invalid. In this view, the other questions do not survive and need not be answered.

A.L./D.S. *Reference answered.*

A. I. R. 1937 Bombay 305

B. J. WADIA, J.

Demibai Gengji Sojpal — Plaintiff.

v.

Rowji Sojpal and *others* — Defendants.

In re *Cooverji Keshavji Shah.*

O. C. J. Suit No. 572 of 1935, Decided on 9th July 1936.

(a) Contempt—Printed article about pending case—Proceedings in suit pending in Court are privileged — Abuse of parties amounting to ridicule or contempt is prohibited — Editor publishing articles vilifying and abusing parties to pending suit—Test is whether articles have tendency to interfere with due and proper administration of justice—Intention of writer is immaterial.

All proceedings in suits pending in a Court of justice are privileged, and any comment on the subject matter of the suit, and any abuse of the parties or holding them up to ridicule and contempt in the eyes of the public whilst the suit is pending are not allowed. Where the editor of a newspaper is charged for contempt of Court by writing articles thereby abusing and vilifying the parties to a pending suit in relation to their defence and thereby prejudicing a fair trial for them at the hearing, the test in such cases is not whether the writings have in fact obstructed or interfered with the administration of justice, or will obstruct or interfere with the administration of justice, but whether they are calculated to do so, or whether it is likely that they will have that effect. The intention of the writer may often be of secondary importance. Whether the articles will in fact prejudice the defendants or not, or scare away their witnesses, or lead them to compromise the suit, is not the real and proper test in such a case. The Court has to read the articles and see whether the articles may have that effect and thereby tend to interfere with the proper course of justice. [P 306 C 2; P 307 C 1]

(b) Contempt — Libel on parties to suit—Libel not interfering with administration of justice—Person aggrieved cannot proceed in contempt against author of libel—He has other remedies open to him.

A libel on the parties to a suit which does not amount to an interference with the course of administration of justice is a matter in respect of which the aggrieved party can have his remedies elsewhere. He may either prosecute the writer in a criminal Court of law, or he may bring an action for defamation in a civil Court. But he cannot proceed in contempt against the author of the libel. [P 306 C 2; P 307 C 1]

(c) Contempt—Proceedings of—Object.

The object of proceedings in contempt is not so much to vindicate the dignity of the Court or of the person of the Judge, as to ensure that every litigant in a Court of justice has a fair and unprejudiced hearing at the trial on the merits of his case. [P 307 C 1]

N. P. Engineer and *M. C. Chagla* — for Defendants.

M. A. Jinnah and *M. M. Desai* — for Cooverji K. Shah.

Order.—This is a rule nisi taken out by the defendants in Suit No. 572 of 1935 against Cooverji Keshavji Shah, the editor, printer and publisher of a weekly newspaper in Bombay called the Satya Prakash and Swadesh, to show cause, if any he has, why he should not be committed for contempt of Court in having edited, printed and published in his newspaper the four articles set out in the rule, and why he should not be restrained by an order and injunction of this Court from publishing further articles of a like nature in the future. This suit was filed on 9th April 1935 by the plaintiff against the defendants for maintenance and residence out of the joint family properties which she says are in the possession of the defendants. On the day on which the plaint was filed the plaintiff took out a notice of motion for an order that she should be paid a sum of Rs. 3,000 per month for interim maintenance, and that the defendants should be restrained by injunction of the Court from alienating the properties in their hands. The notice of motion came on for hearing on 27th June 1935, when by consent no order was made for interim maintenance but the suit was expedited. The suit is still pending.

The four articles referred to in the rule are dated 18th April, 4th July, and two of 26th December 1935. First article was published after the suit was filed but before the notice of motion was heard. The remaining three articles were published after the notice of motion was heard. First article is headed, "a Widowed Member of a Wealthy Multimillionaire Family". It is not necessary for me to relate the substance of this article in detail. It has been translated, and the relevant passages in it have also been set out and referred to in the affidavits. In this article the editor expressed his opinion that widows in the community of the defendants, viz., the Cutchi Visa Oswal caste, seemed to have no alternative left for the assertion of their rights but to go to a Court of law, meaning that there was no hope for the plaintiff to get anything from the defendants except what she could get by a decree or order of the Court. Article 2 is headed, "Rao Saheb Raoji Sojpal, J. P. thinks that fighting in Court against a helpless widow is creditable on his part." This implies that in defending a widow's suit defendant 1 was acting discreditably irrespective of whether his defence was good or otherwise. In that article defendants 1 and 2 have been attacked personally. I do not agree with the editor in his contention that he has criticised them, not in reference to the suit, but as public men, or men of importance in their own community. The third article is headed, "The cat is coming out of the bag". It is in the form of a letter, and the substance and the tone of the article generally, with its metaphors and comparisons, assume a more serious aspect than the first two articles. The comparison with Aurangzeb and that Emperor's treatment of his brothers, which is known to all students of history, is very unfortunate, because it represents defendants 1 and 2, who are described as "the treacherous pair" as treating their deceased brother's widow in the same ruthless manner in which Aurangzeb dealt with his brothers. I do not agree with the defendants in their contention that there is an allegation against them of misappropriating the plaintiff's husband's estate. The mere fact that comment is made on a sum of Rs. 5 as being grossly inadequate for maintenance or even niggardly does not in any way substantiate an allegation of misappropriation. The article however openly alleges that defendant 2 is more concerned with the welfare of dogs and pigeons than of a widowed member of the family. The last article is headed, "Intoxication of Wealth". Defendants 1 and 2 are described as very rich men, intoxicated by their wealth, so intoxicated as not to care to give to the plaintiff what is her due, considering that her deceased husband belonged to a rich and well to do family in the community.

These are all the articles with which I am concerned. As I have stated before, I do not wish to go into them in detail, but I agree with counsel for the defendants that there are statements in them which refer to the defendants, not merely as men of importance in their community, but as defendants, and in relation to their defence in the suit. They contend that the articles tend to prejudice them in their defence in the suit, and thereby prejudice a fair trial at the time of the hearing. There are also statements made in those articles which are not correct in all material particulars. The respondent, on the other hand, alleges that he has been working and writing as a social reformer in the interest of the widows of the community for some time past, and that he has been criticising the conduct of defendants 1 and 2, merely as leading members of their community and not as parties to the suit, and therefore whatever other remedies they may have against him, he is not guilty of contempt of Court.

The law on the subject of contempt of Court has been laid down from ancient times, and is to be found in Hailsham's Laws of England, Vol. 7, in the well-known work of Oswald on Contempt, and in several decided cases, which were referred to and mentioned in the argument. It has been laid down in an old case in (1742) 2 Atk 469[1] at p. 471, that offences which constitute contempt of Court are of three kinds, viz., those which (1) scandalise the Court, or (2) abuse the parties concerned in causes there, or (3) prejudice mankind against persons before the cause is heard. It has also been laid down that anything which tends to excite prejudice against the parties in litigation while it is pending is contempt of Court. That case has been followed in numerous later decisions, and is reproduced by Oswald in his Edn. 3 at p. 91: *see also* (1930) 2 Ch 368[2] at p. 375. There is no question here of scandalising the Court. The question is only whether the editor has been guilty of abusing and vilifying the parties to a pending suit in relation to their defence, and thereby prejudicing a fair trial for them at the hearing. The test in such cases is not whether the writings have in fact obstructed or interfered with the administration of justice, or will obstruct or interfere with the administration of justice, but whether they are calculated to do so, or whether it is likely that they will have that effect. The intention of the writer may often be of secondary importance ; the question is, what is the effect of the articles, and have they a tendency to obstruct and interfere with the due and proper course of administration of justice ? It has been held that a libel on the parties to a suit which does not amount to an interference with the course of administration of justice is a matter in respect of which the aggrieved party can have his remedies elsewhere. He may either prosecute the writer in a criminal Court of law, or he may bring an action for defamation in a civil Court. But he cannot proceed in contempt against the author of the libel.

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[1] The St. James Evening Post case, (1742) 2 Atk 469=26 E R 683.

[2] *In re* William Thomas Shipping Co., (1930) 2 Ch 368=99 L J Ch 560.

Another proposition which has been well established is that all proceedings in suits pending in a Court of justice are privileged, and any comment on the subject matter of the suit, and any abuse of the parties or holding them up to ridicule and contempt in the eyes of the public, whilst the suit is pending, are not allowed. In my opinion it would be simply disastrous for the due and proper administration of justice, if when a suit is still pending investigation in a Court of law, that investigation was to be taken out of the hands of the Court and practically left to the press. The object of proceedings in contempt is not so much to vindicate the dignity of the Court or the person of the Judge, as to ensure that every litigant in a Court of justice has a fair and unprejudiced hearing at the trial on the merits of his case.

Taking this to be the established law on the subject, I have to consider it in connexion with the statements contained in the four articles which are the subject matter of the rule. The editor is entitled, and has every right to carry on his work of social reform in his journal, and to work in the cause of the uplift of Hindu widows. It is also well-known that in order to reform, the reformer must first educate, and there is no medium through which the work of educating public opinion on an important subject can be better carried on than a well-conducted press. If the editor had merely indulged in the ornate language which he has used, being carried away by his zeal, the Court would have had nothing to say. This Court is not a Court of morals, nor can it adjudicate upon the taste in which articles are written in the press. The only question is whether the writer has not overstepped the limits by publicly attacking parties to a suit who may have a good defence, but whose defence has not yet been heard. **Whether the articles will in fact prejudice the defendants or not, or scare away their witnesses, or lead them to compromise the suit, is not the real and proper test in such a case. The Court has to read the articles and see whether the articles may have that effect, and thereby tend to interfere with the proper course of justice.** In my opinion the articles have that tendency.

I am well aware of the principle that contempt proceedings are quasi-criminal, and that the Court does not commit for contempt unless the offence is of so serious a nature as to render the exercise of the Court's summary jurisdiction necessary in order to prevent interference with the course of justice. Considering the articles as a whole, they do constitute a contempt of the Court, and I must make the rule absolute. I take into consideration the fact that the editor has stated, though half-heartedly, that if the Court thought that he was guilty of contempt, he would be willing to apologise to the Court. That is not the sort of apology which would save him from the consequences of his act, but I still take it into consideration, and in my opinion the requirements of justice will be satisfied if I severely reprimand the editor for the articles that he has written, and warn him against the repetition of such articles in reference to parties to pending suits in the future. I have already made the rule absolute, which imposes upon him an injunction restraining him from writing articles of a like nature in the future, that is, articles abusing parties to pending suits in relation to the subject matter of those suits. In addition to the injunction I also warn him as to the future conduct of his newspaper in relation to pending suits. For the present the Court will only express its sense of displeasure by imposing the injunction upon him, severely reprimanding him for what he has written, and cautioning him for the future. He will also pay the taxed costs of the defendants of the rule as between attorney and client. In my opinion this was a fit case for the engagement of two counsel, and I certify accordingly.

K.B./A.L. *Rule made absolute.*

A. I. R. 1937 Bombay 307

BROOMFIELD AND TYABJI, JJ.

Mallappa Basvantrao Desai —
Defendant 1 — Appellant.

v.

Tukko Narasinha Mutalik and *others*—
Plaintiffs — Respondents.

First Appeal No. 75 of 1931, Decided on 14th August 1936, from decision of First Class Sub-Judge, Belgaum, in Suit No. 184 of 1928.

(a) Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (a) — Scope — S. 4 (a) distinguishes between claims and suits—Cls. (1) and (4), S. 4 (a) apply only where Government is party to proceeding — Merely making Government party is not enough to bring case under those clauses—Government must be more than formal party—If Government is bound by decree to make payment or restore property or if injunction is sought against Government, claim is against Government—Prayer for declaration of title against Government is not claim against Government under S. 4 (a) (1) though it may be so under S. 4 (a) (3)—Suit for order for delivery of possession binding on private party and not enforceable against Government is one not falling under S. 4 (a) (1).

In S. 4 (a), Bombay Revenue Jurisdiction Act, a distinction is made between claims and suits. Under Clauses (2) and (3) it may not be necessary that Government should be a party. On the other hand, Cls. (1) and (4), S. 4 (a) will as a rule only apply where Government is a party, since otherwise it could hardly be said that there was any claim against Government. But the mere fact that Government is a party will not be enough to bring the case under those clauses. The words "claim against Government relating to property or lands" may fairly be said to imply that relief of some kind is sought against Government. Government must be more than a purely formal party. If Government is to be bound by the decree to make any payment or to restore any property, or if an injunction is sought against Government, that is a claim against Government: *18 Bom 319*; *28 Bom 435* and *A I R 1937 Bom 121, Foll.* [P 310 C 2, P 311 C 1]

A prayer for a declaration of the title against Government is not a claim against Government within the meaning of Cl. (1), S. 4 (a) though it may be so under S. 4 (a) (3) : *A I R 1926 Bom 417, Ref.* [P 311 C 1]

A suit to obtain an order for delivery of possession of property which is merely to bind a private party and is not to be enforced against Government, though it may offend against Cl. 3, cannot fall within Cl. (1), S. 4 (a) of the Act : *28 Bom 435, Rel. on.* [P 311 C 2]

(b) Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (a) (3) — Applicability — Suit whether between private parties or against Government nullifying order of Collector, validly made under Bombay Hereditary Offices Act is barred under S. 4 (a) (3)—If relief sought does not affect position of Government, suit cannot be for setting aside or avoiding order of revenue authorities under Bombay Hereditary Offices Act—In such suits Government is neither necessary nor proper party.

A suit whether between private parties or against Government which would have the effect of nullifying an order by the Collector, would be barred by S. 4 (a), Cl. (3), Bombay Revenue Jurisdiction Act. If the relief sought does not affect the position of Government at all, for instance if a person seeks a declaration of his status as a watandar simply with a view to approach the revenue authorities under S. 36 (3), Bombay Hereditary Offices Act, it cannot be regarded as a suit to set aside or avoid an order. In such suits Government is neither a necessary nor a proper party. [P 312 C 1]

Hence if a declaration of status is sought, and a claim for possession is made in flat contravention of the orders of the revenue authorities, the suit certainly comes within the mischief of Cl. (3), assuming that the orders are not ultra vires : *A I R 1921 Bom 17*; *A I R 1930 Bom 254* and *A I R 1936 Bom 301, Foll.* [P 312 C 1]

(c) Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (a) (3) — Bar to suit — It is unnecessary to set aside order made without jurisdiction — Such order does not bar suit for relief inconsistent with it—Valid order under Bombay Hereditary Offices Act bars suit—Such order must be by officer 'duly authorised in that behalf' as laid down in S. 4 (a) (3).

It is not necessary to set aside an order made without jurisdiction. Such an order is no bar to suit for relief inconsistent with it. [P 312 C 2]

An order validly made within the powers conferred by the Bombay Hereditary Offices Act will bar a suit; an order without jurisdiction will not. Such order must have been made by an officer 'duly authorised in that behalf' as laid down in S. 4 (a) (3), Bombay Revenue Jurisdiction Act. [P 312 C 2]

(d) Bombay Hereditary Offices Act (3 of 1874), S. 9—Before Collector can set aside alienation both conditions in S. 9 must be satisfied—Words "passed by virtue of decree into ownership or beneficial possession of person not watandar" imply that change of ownership or possession must be effected by decree — Decree merely recognizing or confirming previous transfer of ownership or possession is not enough—Revenue Officer can exercise prescribed powers if conditions in statute are satisfied — He has no jurisdiction to determine finally whether those conditions are in fact satisfied.

Section 9, Bombay Hereditary Offices Act, lays down two conditions which have to be satisfied before the Collector can set aside an alienation, and, as they are joined by the conjunctive "and" and not by the disjunctive "or" it appears that they must both be satisfied, that is to say, one must be able to predicate of the alienation in question that it took place both otherwise than by virtue of a decree or order of a Court, and without the consent of the Collector. If it took place by virtue of a decree it cannot be set aside even though the Collector did not consent to it. If the Collector consented to it and ownership was transferred in the revenue records, it cannot be set aside even though there was no decree. The words "passed by virtue of a decree into the ownership or beneficial possession of a person not a watandar" surely imply that there must have been a change of ownership or possession effected by the decree. If the transfer of ownership and possession has taken place previously, and the decree merely recognizes or confirms it, it cannot with propriety be said that it has taken place by virtue of the decree. A Revenue Officer can exercise the prescribed powers if the conditions mentioned in the statute are satisfied, but has no jurisdiction to determine finally whether those conditions are in fact satisfied. If he holds after an inquiry that a land is Government land and deals with it accordingly, or if he holds that there has been a breach of the conditions of an occupancy and forfeits the holding, but the civil Court comes to the conclusion that the land was not Government land or that the conditions of the occupancy had not been broken, then the order will be treated as a nullity which does not require to be set aside : *24 Bom 435*; *36 Bom 325* and *AIR 1921 Bom 381*, *Foll.* [P 313 C 1, 2; P 314 C 1]

(e) Bombay Hereditary Offices Act (3 of 1874), Ss. 9 and 11—Act does not provide for determination of status of watandar by Collector but provides only for recognition of representative watandars by him — Grant of lands by ruler before introduction of British rule — Revenue authorities cannot set aside such alienation under S. 9 or S. 11 there being no alienation within meaning of Act—Order setting aside such alienation is not duly authorized—S. 4 (a) (3), Bombay Revenue Jurisdiction Act, does not bar suit regarding such lands.

The determination of the status of being a watandar is one of the matters from which the jurisdiction of the Collector is excluded and no provision is made in the Bombay Hereditary Offices Act for the determination by the Collector of what persons shall be held to be watandars, but only what persons shall be recognized as representative watandars. [P 314 C 1,2]

Where there was a grant of lands by a ruler before the introduction of the British rule the revenue authorities have no power to set aside the alienation under Ss. 9 or 11, Bombay Hereditary Offices Act as in fact there is no alienation within the meaning of the Act. The order setting aside such alienation not being by officer duly authorised under S. 4 (a) (3), Bombay Revenue Jurisdiction Act, it is no bar to a suit regarding such lands : *(1896) P J 666* and *29 Bom 480*, *Foll.* [P 314 C 2, P 315 C 1]

(f) Evidence Act (1872), Ss. 74, 13 and 35 —Register of information regarding Paragana Watandars prepared by Assistant Collector under directions by Collector under order of Inam Committee—Such register is relevant for proving date of grant in it. (Per *Broomfield, J.*; *Tyabji, J.*, *contra*).

(Per *Broomfield, J.*; *Tyabji, J.*, *contra*) — The register of information regarding the Pargana watandars prepared by the Assistant Collector under direction given by the Collector under the orders of the Inam Committee, is a public document within the definition of public document in S. 74, Evidence Act, being a record of the acts of a Public Officer and is relevant under S. 35 or at any rate under S. 13 of the Act for proving the date of grant contained in it : *9 Cal 741* and *14 Cal 120*, *Ref.* [P 315 C 2, P 316 C 2]

H. C. Coyajee and *A. G. Desai* — for Appellant.

G. N. Thakor, *H. B. Gumaste* and *P. B. Shingne* — for Respondents 1 to 8 and 9.

Broomfield, J.—The suit from which this appeal arises was brought by respondents 1 to 8 as plaintiffs against the Desai of Rudrapur as defendant 1 and the Secretary of State, for a declaration that they are watandars of the same watan as defendant 1, for recovery of watan lands which were taken from their possession and handed over to the possession of defendant 1 by orders of the revenue authorities in January 1926, and for mesne profits. The suit has been decreed, and defendant 1 has appealed.

The suit lands which are situated in Budikop in Murgod Mahal of the Belgaum District form part of a Nadgoudki watan inam granted to the ancestor of defendant 1 in 1694. It is the plaintiffs' case that they were granted in pot inam to their ancestor Tukadev some time prior to 1818, that is before the introduction of the British Rule in Murgod Mahal, which took place in 1827 or 1828. The plaintiffs claim to have been in possession ever since that time until evicted by the revenue authorities. In 1862 defendant 1's grandfather Shivlingappa brought an ejectment suit against Annaji, a member of the plaintiffs' family. He obtained a decree in 1864 which was confirmed in appeal in 1866. Annaji's claim to hold under an old grant was held to be fraudulent. When Shivlingappa tried to execute his decree, however, he was obstructed by Annaji's nephew Narso, and under the procedure then in force he had to file a fresh suit against Narso which he did in 1867.

Narso claimed under a sanad, which is Exh. 120 in this case, given to his father by Shivlingappa in renewal of an older grant. In the course of the execution proceedings, Shivlingappa appears to have made a statement in writing to the effect that he had come to an amicable settlement with Narso, that he admitted his claim, and had no objection to the lands remaining with him. This statement was produced at the trial of the suit in 1867, and the Munsif, after framing an issue as to whether it was proper to act upon it or not, decided in the affirmative and dismissed the suit. There was no further litigation and apparently the plaintiffs' family remained in undisturbed occupation for the next half century, and when the Record of Rights was compiled in 1907, they were duly entered as pot inamdars. In 1924 defendant 1 applied to the revenue authorities for restoration of the lands to him under the Watan Act. The District Deputy Collector found that the plaintiffs had been in possession from before the introduction of the British Rule, and that they were watandars and declined to interfere. On appeal, the Collector reversed his order and allowed defendant 1's claim on 13th November 1925, and this decision was confirmed by the Commissioner on 19th May 1926. These officers relied on the decree in the suit of 1862 against Annaji, disregarded the decree of 1867 on the ground that it had been obtained by fraud, and held that the plaintiffs had obtained possession after 1843, and that too, fraudulently and not under any valid grant. The Commissioner was of opinion that the plaintiff's possession probably only dated from 1867, the year of the compromise decree. Government declined to interfere with these orders, and in consequence the plaintiffs, who were evicted in January 1926, failed to recover possession.

The plaint alleged that the orders of the revenue authorities were ultra vires and not binding on the plaintiffs and that they are entitled to the lands in suit as watandars of the same watan, the lands having been granted to them by defendant 1's ancestor Kashappa before 1818. Defendants denied that the plaintiffs are watandars by reason of any grant or otherwise, and contended that the suit is barred by the Revenue Jurisdiction Act, S. 4 (a), by limitation, not having been brought within a year of the Collector's order or the date of dispossession of the plaintiffs, and also by res judicata by reason of the decree in the suit of 1862. The main findings of the trial Judge on the law points are : (1) the suit is not barred either by Cl. (1) or Cl. (3), S. 4 (a), Revenue Jurisdiction Act — not by Cl. (1) because there was no claim against Government, not by Cl. (3), because he held that the orders of the revenue authorities were without jurisdiction, there being no power to ignore the decree of 1867; (2) there is no bar of limitation as it was not necessary to set aside ultra vires orders; (3) there is no bar of res judicata because the decree in the suit of 1862 was against Annaji Narso.

The plaintiffs are the descendants of Annaji's brother Tukadev : *see* the pedigree at page seven of the print ; and the Judge finds that there was a separation between Annaji and his brother prior to 1844, and that the suit lands had fallen to the share of the plaintiff's branch. On the merits the Judge finds that there was a grant of the lands to the plaintiffs' ancestor in 1811, and they are therefore watandars of the same watan within the definition in S. 4, Watan Act. The principal issues in this appeal are these : (1) Whether the jurisdiction of the civil Court is barred by the Revenue Jurisdiction Act, S. 4 (a), Cl. (1) or Cl. (3). (2) Whether the revenue authorities acted within their jurisdiction in declaring the alienation null and void and dispossessing the plaintiffs. (3) Whether the plaintiffs are watandars of the same watan, which means, as admittedly they are not members of the watan family, whether there was a grant to them before the introduction of the British Rule in 1827 or 1828 : *see* the definition of 'watandar' in S. 4, Watan Act. (4) Whether the suit is barred by limitation; and (5) whether it is barred by res judicata.

Clause (1), S. 4 (1), Revenue Jurisdiction Act, was not specifically referred to in the written statement of either defendant. The written statement put in on behalf of the Secretary of State suggests that Cl. (3) only was relied upon. However both clauses were set up in bar of the suit at the hearing, and it is clear, I think, that the Court itself must take notice of any statutory bar to the entertainment of the suit. In S. 4 (a) a distinction is made between claims and suits. Cls. (1) and (4) speak of claims against Government; Cl. (2) speaks of claims to perform duties; and Cl. (3) speaks of suits to set aside or avoid orders. Under Cls. (2) and (3) it may not be necessary that Government should be a party. On the other hand, Cls. (1) and (4) will as a rule only apply where Government is a party, since otherwise it could hardly be said that there was any claim against Government. But the mere fact that Government is a party will not be enough to bring the case under those clauses. The words "claim against Government relating to property or lands" may fairly be said to imply that relief of some kind is sought against Government. Government must be more than a purely formal party. If Government is to be bound by the decree to make any payment or to restore any property, or if an injunction is sought against Government, the position is clear—that is a claim against

Government: *see* 18 Bom 319[1], 28 Bom 435[2] and 38 Bom L R 1308.[3]

It has been argued by the learned counsel on behalf of the appellant, that the authorities go further than this and show that even a prayer for a declaration of title, if it is inconsistent with orders made by the revenue authorities and if the object of making Government a party is to make the declaration binding upon Government, is a claim against Government. For this proposition reliance has been placed on *F. A. No 269 of 1918*[4] and on 28 Bom L R 651[5] in which the observations of Fawcett, J., in the former case are cited and approved; also on *F. A. No. 328 of 1926*[6] in which *Baslingappagouda* v. *Secretary of State*[5] was followed. I do not, however, understand these cases as laying it down that a prayer for a declaration of the title against Government is a claim against Government within the meaning of Cl. (1). Rather it seems to have been held to come under Cl. (3). In *Sagunappa Shankarappa* v. *Bhau Annaji Patil*[4] Fawcett, J. said this (p. 169 of the paper book):

> It is contended that the Court has power to make a declaration of the kind granted by the lower Court, because this does not directly touch the Collector's order under S. 9 of Bombay Act 3 of 1874, but merely deals with the reasons on which that order was passed. But, in my opinion, when an order is based on a specific decision that a person is not a watandar, a person seeking to obtain a declaration from a civil Court that that decision is bad, certainly seeks to avoid that order. The word 'avoid' is a very wide one. Its literal meaning is 'to make empty' and the particular meaning, which affects Cl. 4 (a), Bombay Revenue Jurisdiction Act, is given in Webster's Dictionary as 'to make void, to annul or vacate or to refute'. It will obviously refute the Collector's order if a declaration is obtained that the basis on which it is made is erroneous; and it is not denied that the real object of the suit is to take this declaration to the Collector and endeavour to induce him to reverse his previous order against the plaintiff.

Then, a little further on, the learned Judge says:

> Accordingly, I think the case clearly falls within para. 3, Cl. (a), S. 4. Also so far as the suit seeks relief against Government relating to watan land, it falls within the first paragraph of that clause.

The plaintiff in that case claimed possession of watan lands as against two defendants one of whom was the Secretary of State. It was that claim which brought the case within Cl. (1) and it is that circumstance which in that respect distinguishes both that case and the present from *First Appeal No. 47 of 1910*,[7] which has been relied on by the trial Judge. In the latter case a declaration was sought both against the Secretary of State and other defendants, but possession of the lands in suit was sought against the latter only, and that explains why the Court said "the suit was not on the face of it a claim against Government", a position which was conceded on behalf of Government. If what the plaintiffs seek is an order for delivery of possession of property which is merely to bind a private party and is not to be enforced against Government, the suit may offend against Cl. (3) but can hardly be brought within Cl. (1). That, it is true, is not the position in the present case. Here the plaintiffs did not say in the plaint that they wanted an order for possession as against defendant 1 only, without seeking to bind the Secretary of State, and it is perfectly obvious that Government was made a party in order that their claim to possession of the lands might be enforced against Government. That being so, there was a claim against Government, namely a claim for possession, which a civil Court could not entertain. As a matter of fact, however, the Court did not entertain it. The order for delivery of possession has been made against defendant 1 only. In these circumstances even on the authorities relied on by Mr. Coyajee, e. g., 28 Bom 435[2] I do not think the suit is liable to be dismissed as barred by Cl. (1). If it is barred it must be by Cl. (3).

Clause (3), S. 4 (a) has been considered by a Full Bench of this Court in 45 Bom 1141.[8] The actual point decided was

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1. De Souza Devino v. Secretary of State, (1893) 18 Bom 319.
2. Appaji v. Secretary of State, (1904) 28 Bom 435=6 Bom L R 438.
3. Khangouda v. Secretary of State, A I R 1937 Bom 121=168 I C 73=I L R 1937 Bom 236 =38 Bom L R 1308.
4. Sagunappa Shankarappa Nadgauda v. Bhau Annaji Patil, First Appeal No. 269 of 1918, decided on 17th August 1920, by Macleod, C. J. and Fawcett, J.
5. Baslingappagouda v. Secretary of State, A I R 1926 Bom 417=95 I C 1008=28 Bom L R 651.
6. Madivalappa v. Bhomappa, First Appeal No 328 of 1926.
7. Bhimangouda v. Secy. of State, First Appeal No. 47 of 1910, decided by Scott, C. J. and Batchelor, J.
8. Dattatraya Keshav v. Tukaram Raghu, A I R 1921 Bom 17=61 I C 572=45 Bom 1141=23 Bom L R 376 (F B).

that an order of the Collector refusing to declare an alienation null and void under S. 11, Watan Act, is not an order which has to be set aside, and a suit against the alienee is not barred by S. 4 (a), Revenue Jurisdiction Act. It was conceded in the argument in that case that S. 4 (a) would have barred the suit if the order had declared the alienation null and void, and that was assumed to be so, though Macleod, C. J., mentioned *Bhimangouda* v. *Secretary of State*,[7] where it had been held that ultra vires orders declaring alienations null and void need not be set aside. That question was not judicially determined one way or the other in the Full Bench case. But it is certainly an authority for the view that a suit whether between private parties or against Government which would have the effect of nullifying an order by the Collector, would be barred by S. 4 (a), Cl. (3), at any rate if the order is validly made under the Watan Act. On that point Fawcett, J.'s observations in *Sagunappa Shankarappa* v. *Bhau Annaji Patil*,[4] already cited are clearly in point. If the relief sought does not affect the position of Government at all, for instance if a person seeks a declaration of his status as a watandar simply with a view to approach the revenue authorities under S. 36 (3), Watan Act, as in 54 Bom 125,[9] it cannot be regarded as a suit to set aside or avoid an order. In that connection I may also refer to 38 Bom L R 593,[10] in which the Privy Council case in 54 I A 380[11] is discussed. In such suits, as Patkar, J. said in *Hanmant Ramchandra* v. *Secretary of State*,[9] Government is neither a necessary nor a proper party. If however as in *Sagunappa Shankarappa* v. *Bhau Annaji Patil*,[4] and in the present case, a declaration of status is sought, and a claim for possession of lands is made in flat contravention of the orders of the revenue authorities, the suit certainly comes within the mischief of Cl. (3) assuming, as I am for the present assuming, that the orders are not ultra vires.

That I think is what the authorities say, and even apart from authority it must be so. It seems obvious that it must have been the intention of the Legislature that such a suit should be barred. If it were open to a party to ignore the Collector's order and claim relief in the civil Court in spite of it, there would be an end of the revenue jurisdiction which Act 10 of 1876 was devised to protect. There is no sense in saying that a party may not in terms seek to set aside an order. For if the order is within the powers conferred by the Watan Act, and it is not set aside, it follows that it remains in force, and the civil Courts could not grant relief inconsistent with it. But (and this is where the difficulty comes in the present case) it is not necessary to set aside an order made without jurisdiction. Such an order is no bar to a suit for relief inconsistent with it. The proposition which was assumed though not adjudicated upon in the Full Bench case, viz., that the civil Courts cannot entertain any suits to set aside an order declaring alienations null and void, cannot be regarded as a correct statement of the law without qualification. An order validly made within the powers conferred by the Watan Act will bar a suit. An order without jurisdiction will not. In that connexion reference may be made to 19 Bom 581,[12] 37 Bom 37[13] and 27 Bom L R 463.[14] The order must have been made by an officer "duly authorized in that behalf" as Cl. (3) says. This position is conceded by Mr. Coyajee for the appellant and by the Government Pleader.

In order, therefore, to decide whether the present suit is barred by Cl. (3), we have to ascertain whether the orders of the revenue authorities were within their jurisdiction. The orders were passed under S. 9 and S. 12. We have had a very long and learned argument on the construction of the former section. Omitting what is unnecessary for our purpose, and reducing this rather clumsy and cumbrous piece of legislation to its simplest terms we may put it in this form : an alienation of a watan (that is the passing of the watan into the ownership or beneficial possession of a person not a watandar of the same watan), before the Act came into force, may be declared null and void by the Collector whenever it has taken place (a) otherwise than by virtue of a decree or order of a British Court; and (b) without the consent of the Collector and transfer of ownership in the revenue records. The section lays down two conditions which have to be satisfied before the Collector can set aside an alienation, and, as they are joined by the conjunctive 'and' and not by the disjunctive 'or', it appears that they must both be satisfied, that is to say, if this view is right, you must be able to predicate of the alienation in question that it took place both otherwise than by virtue of a decree or order of a Court, and without the consent of the Collector. If it took place by virtue of a decree it cannot be set aside even though the Collector did not consent to it. If the Collector consented to it and ownership was transferred in the revenue records, it cannot be set aside even though there was no decree. This seems to be the natural and grammatical meaning of the language used. The construction contended for by Mr. Coyajee, viz., that the Collector may declare an alienation null and void unless it took place by virtue of a decree or order which was consented to by the Collector, cannot possibly be deduced, in my opinion, from the language used in the section.

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[9] Hanmant Ramchandra v. Secy. of State, A I R 1930 Bom 254=129 I C 391=54 Bom 125=32 Bom L R 155.

[10] Basangouda v. Baslingappa, A I R 1936 Bom 301=164 I C 703=38 Bom L R 593.

[11] Laxmanrao Madhavrao v. Shriniwas Lingo, A I R 1927 P C 217=105 I C 694=54 I A 380=51 Bom 830 (P C).

[12] Anantacharya v. Secretary of State, (1895) 19 Bom 581.

[13] Maganchand v. Vithalrav, (1913) 37 Bom 37=17 I C 148=14 Bom L R 793.

[14] Bhikaji v. Secretary of State, A I R 1925 Bom 365=92 I C 110=49 Bom 554=27 Bom L R 463.

It seems to be sufficiently clear that this alienation took place without the consent of the Collector. (Mr. Thakor has pointed out that in 1907 when the Record of Rights was compiled the plaintiffs were entered in the records as pot inamdars in respect of these lands, but this is immaterial. The condition in S. 9 is that an alienation must have taken place before the Act came into operation, without the consent of the Collector. The consent must relate to the time when the lands passed into the ownership and beneficial possession of a non-watandar.) If in addition to being without the consent of the Collector the alienation took place otherwise than by virtue of a decree, the revenue authorities had power to declare it null and void. The trial Judge took the view that there was an alienation by virtue of the decree of 1867. After referring to the litigation of that year, he says:

> Whether the watandar's opponent occupies the position of a plaintiff and obtains a decree to recover possession of watan and recovers it accordingly, or whether he occupies the position of defendant and succeeds in defeating the watandar's suit to recover possession of the watan and as a result retains the possession thereof with himself, in either case the watan, I think, equally passes into the ownership or beneficial possession of an outsider of virtue by a decree of the Court.

Mr. Thakor for the respondents has supported this view, but in my opinion it is not tenable. The words "passed by virtue of a decree into the ownership or beneficial possession of a person not a watandar" surely imply that there must have been a change of ownership or possession effected by the decree. If the transfer of ownership and possession has taken place previously, and the decree merely recognizes or confirms it, it cannot with propriety be said that it has taken place by virtue of the decree. That seems to be the position here. The plaintiffs alleged and the trial Judge has found it proved that there was a grant to their predecessor in 1811. On any reasonable view of the evidence it is impossible to avoid the conclusion that there had been an alienation to the plaintiffs long before 1867. If so, it was not by virtue of the decree which shows merely that Shivlingappa for some reason abandoned his attempt to recover possession. That brings us then to this position. There was neither a decree nor any consent of the revenue authorities to bar the Collector from taking action under S. 9, if in fact there was an alienation within the meaning of that section. In the present case that depended on the question whether there was or was not a grant of the lands to the plaintiffs before the introduction of the British Rule. The District Deputy Collector found that there was such a grant and that therefore the plaintiffs were watandars of the watan and there was no alienation. The trial Judge has taken the same view, and we, for reasons which I shall explain later, accept that finding. But the higher revenue authorities decided otherwise, and that gives rise to the very difficult question, whether in the circumstances the final orders of the revenue authorities must be regarded as being unauthorized and without jurisdiction as the trial Judge has held.

With considerable hesitation, as I freely admit, we have come to the conclusion that this is the law. At first sight, it would certainly appear that as the Collector has power to set aside alienations in certain circumstances he must be intended to have jurisdiction to decide whether an alienation has in fact taken place. If so, the ruling in 27 I A 216[15] would presumably apply and he would have jurisdiction to decide wrong as well as right. But it is by no means clear that the Collector acting under S. 9 is in the same position as a Court in this respect or that he has any jurisdiction to determine finally the facts on which his jurisdiction depends. A long line of decisions on the Bombay Land Revenue Code [I need only mention 24 Bom 435,[16] a judgment of Sir Lawrence Jenkins, C. J., in 36 Bom 325[17] and 45 Bom 920[18]] has in effect established this position that a Revenue Officer can exercise the prescribed powers if the conditions mentioned in the statute are satisfied but has no jurisdiction to determine finally whether those conditions are in fact satisfied. If he holds after inquiry that a land is Government land and deals with it accordingly, or if he holds that there has been a breach of the conditions of an occupancy and forfeits the holding, but the civil Court comes to the conclusion that the land was not Government land or that the conditions of the occupancy had not been broken, then the order will be treated as a nullity which does not require to be set aside. It is quite true that these cases were concerned with Article 14, Lim. Act. The orders in question were held to be not made in the Collector's official capacity within the meaning of that article. But I find it very difficult to see how these cases, the authority of which has not been questioned, can be distinguished in principle. For the same reasons it would appear that the orders of the Collector and the Commissioner in this case were the orders of officers not "duly authorised in that behalf" within the meaning of Cl. (3), S. 4, Revenue Jurisdiction Act.

Nor is it necessary to rely merely on the analogy of these cases. In (1896) P J 666[19] it was held by Parsons and Ranade, JJ. that the determination of the status of being a watandar is one of the matters from which the jurisdiction of the Collector is excluded, and that no provision is made in the Watan Act for the determination by the Collector of what persons shall be held to be watandars, but only what persons shall be recognized as representative watandars. This case has been criticised in *F. A. No. 213 of 1916*[20] and *F. A. No. 269 of 1918*[4] and I should hesitate to follow it if it stood alone. But there are observations of the same tenor in Batty J.'s judgment in 29 Bom 480,[21] at p. 504 where numerous authorities are referred to as showing "how carefully the Courts have avoided an implication of ouster of jurisdiction when legal rights are in question". Moreover in *Bhimangouda* v. *Secretary of State*,[7] decided by Scott, C. J. and Batchelor, J., this Court applied precisely the same principle in the case of the Watan Act as has been applied by Sir Lawrence Jenkins and many other learned Judges in the cases on the Bombay Land Revenue Code. There the Collector had decided that there had been an alienation, and had made an order under S. 11 with the result that the alienee was evicted. This Court after examining the evidence came to the conclusion that there had been no alienation and that therefore the order was ultra vires and the Revenue Jurisdiction Act was no bar.

In the course of the arguments in this case we have been referred to some rulings, for instance *Baslingappagouda* v. *Secretary of State*[5] and *Gujappa* v. *Secretary of State*,[20] which are not easy to reconcile with the decision in *Bhimangouda* v. *Secretary of State*.[7] But, as far as I am aware, there is no case which definitely weakens its authority or which after facing the issue lays down the proposition that the civil Courts are bound by the finding of the Collector on the question of fact whether there has or has not been an alienation. I am speaking of course with reference to Ss. 9 and 11, Watan Act. In the case of S. 10 the language used indicates that the Collector is to be the judge. I think, therefore, we must hold that as there was a grant of these lands to the plaintiffs' predecessor before 1827, the revenue authorities had no power to set aside the alienation, for in fact there was no alienation within the meaning of the Act. The orders passed were not duly authorised and Cl. (3), Revenue Jurisdiction Act is no bar to the suit.

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[15] Malkarjun v. Narhari, (1900) 25 Bom 337=27 I A 216=2 Bom L R 927=7 Sar 739 (P C).

[16] Surannanna v. Secretary of State, (1900) 24 Bom 435=2 Bom L R 261.

[17] Malkajeppa v. Secretary of State, (1912) 36 Bom 325=15 I C 517=14 Bom L R 332.

[18] Dhanji v. Secretary of State, A I R 1921 Bom 381=61 I C 347=45 Bom 920=23 Bom L R 279.

[19] Ramrao v. Secretary of State, (1896) P J 666.

[20] Gujappa v. Secretary of State, First Appeal No. 213 of 1916.

[21] Balvant Ramchandra v. Secretary of State, (1905) 29 Bom 480=7 Bom L R 497.

In giving reasons for our finding on the merits I shall be quite brief as the evidence has been fully and fairly discussed in the judgment of the trial Judge. He has based his finding that plaintiffs are watandars by reason of a grant in 1811 mainly on evidence not produced before the revenue authorities, and he opines that the Collector and Commissioner were right in the view they took of the evidence produced before them. With that opinion I am unable to agree. I think the documents then produced were quite sufficient prima facie evidence of a pre-British grant, though the additional evidence no doubt makes the position a great deal stronger. Ex. 120 is a sanad of the year 1845 purporting to have been granted by Shivlingappa, grandfather of defendant 1, in favour of plaintiffs' grandfather in replacement of a former sanad granted by his father which had been lost. It was produced in the litigation of 1867 when Shivlingappa admitted it. It bears the seal of the Desai; and there is no good reason for doubting its authenticity. Practically all that is urged against it is that it does not mention the year of the original grant. But we know from Shivlingappa's statement (Ex. 126) before the Inam Commission in 1851, that his father had died 35 years before that year. So that any grant by him must have been in pre-British times. Ex. 60 is a statement of particulars of inam lands in Budikop furnished by Shivlingappa to the Inam Commission and signed by him. It shows that two-thirds of the lands bearing assessment of Rs. 50 out of a total of Rupees 75 were pot inam. There is no suggestion that any of these lands had been granted in pot inam to any person other than the plaintiffs. It seems perfectly legitimate to infer from these three documents alone that the previous grant referred to in Ex. 120 was the grant of the pot inam mentioned in Ex. 60, and as it was made by Shivlingappa's father, it must have been before 1827.

Coming to the additional documents produced in this suit, Ex. 131 is a yadi or list of all the Desai's inam lands with particulars thereof dated 1825. Lands in Budikop assessed at Rs. 40, which is two-thirds of the assessment as it then was, are shown as pot inam in the name of the plaintiffs' ancestor Tukopant. This is evidently the same pot inam as is referred to in the Inam Commission statement, Ex. 60. This document bears the Desai's seal, and was apparently sent with other documents by Shivlingappa to the Mahalkari in 1845: *see* Ex. 130. It is objected that it has not previously been produced in evidence. But it does not appear that there was any need or opportunity for its production till 1924, and it may not have been thought necessary then. The evidence actually produced was enough to satisfy the District Deputy Collector.

Exhibits 122 and 124 are akarbands of 1841 and 1844 respectively, purporting to be signed by Shivlingappa, and refer to the same pot inam. The documents so far mentioned, which are all originals, afford ample justification for the finding of the District Deputy Collector and the trial Judge that the plaintiffs held the lands by a pre-British grant. I can see no good reason for supposing that any of them are forgeries. None of them, it is true, gives the exact date of the grant of the pot inam. But, as I have shown, they make it clear that it must have been before 1827. The date of the grant, 1811, is mentioned in Ex. 151 which is described in the heading as a register (takta) of information regarding the pargana watandars, prepared by the Assistant Collector under the directions given by the Collector under the orders of the Inam Committee. The date of the document is 1847. This is not an original. The copy which has been produced was obtained from the mamlatdar in September 1930. Mr. Coyajee contends that it is not a public document and cannot be proved by a certified copy, also that it is not relevant evidence. He relies on 9 Cal 741[22] and 14 Cal 120.[23] I think it comes within the definition of a public document in S. 74, being a record of the acts of a Public Officer, and I think it is relevant under S. 35 or at any rate S. 13, Evidence Act. Its value as evidence may be doubtful since we do not know the source of the information on which the statement was prepared. Taken along with the other evidence it is an important addition to the plaintiffs' case, but by no means indispensable to it. I do not propose

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22. **Ram Chunder Sao v. Bunseedhur Naik, (1883) 9 Cal 741.**

23. **Dwarka Nath Misser v. Tarita Moyi Dabia, (1886) 14 Cal 120.**

to discuss the other documents. They are all copies. There is some doubt as to their admissibility, and the plaintiffs' title is sufficiently proved without them.

On the issue of limitation I need say nothing further. The cases already cited in connexion with the Revenue Jurisdiction Act show that Art. 14 can have no application, the acts of the revenue authorities being without jurisdiction. As to the issue of res judicata, the trial Judge finds that Annaji and Tukadev were separate mainly on the strength of certain revenue registers in which they were shown as having separate defined shares in the Kulkarni watan of Budikop and Nugganhatti. I think this is reliable evidence. The suggestion that it may have been the result of a friendly arrangement between joint brothers is not at all convincing. Besides the very fact that Shivlingappa had to file a suit against Narso Tukadev in 1867, shows that the decree obtained against Annaji did not bind Narso. The plaintiffs are not barred by the decree against Annaji. There is much more to be said, I think, for the view that defendant 1 is bound by the decree of 1867 dismissing Shivlingappa's suit against Narso. I agree with Mr. Thakor that there are no tangible and sufficient grounds for holding that there was anything fraudulent or collusive about that decree. I think Shivlingappa consented to the dismissal of his suit because he knew he had no case, and that explains why no attempt was made to set aside the decree for more than fifty years.

One other point must be mentioned. Mr. Thakor argued that as the grant to the plaintiffs was before the introduction of the British Rule, and as at that time there was no prohibition against the alienation of watans, the grantees acquired a right of suit to protect their property which could not be taken away by S. 4, Revenue Jurisdiction Act. He relies on 23 Bom L R 492[24] and 40 I A 48.[25] The point was not taken in the trial Court. It has been rather sketched than fully developed in this Court. I doubt if there is anything in it in view of 21 Bom L R 1155,[26] cited by Mr. Coyajee. But under the circumstances, and as it is not necessary for the determination of the case, I prefer not to express any definite opinion. For these reasons the appeal fails and must be dismissed. The appellants will pay the costs of respondents 1 to 8. The Secretary of State, respondent 9, has supported the appellants and will pay his own costs.

Tyabji, J.—I have come to the same conclusion. The difficulties in this case arise primarily from the points for decision depending on Acts of the Legislature, whose language has not been uniformly interpreted, and from the evidence having to be traced back to a century from now, without the guidance of any straightforward principle to indicate the side on which substantial justice lies,—except perhaps as a last resort, that long-standing possession ought not to be lightly disturbed. Chronologically the first event we have to consider is whether at some time prior to 1816 there was a grant by the defendant's ancestors of a pot inam (i. e., a subsidiary grant out of an inam), in favour of the plaintiffs' ancestors. I agree generally with my learned brother with reference to the evidence in that connection. I have doubts however about the admissibility of Ex. 151, which purports to be a copy of a register of information in a tabular form, prepared in 1847 by the Assistant Collector under the directions of the Collector, under the orders of the inam Committee.

In that tabular statement it was stated that there was a pot inam in favour of 'the present vahivatdar.' It was urged that that part of the statement cannot be considered to be a public record: 9 Cal 741.[22] The Indian Evidence Act makes the admissibility of a document depend ultimately on the weight to be attached to it. In practice it is not of much importance whether the Court holds that a document is admissible in evidence but must carry little weight, or whether it is not admitted at all. In this case I should prefer to say that the document was not admissible in evidence, rather than to admit it and say that it does not carry us much further. The reason seems to me that there is no basis for relying on or testing the truth of the information so far as the pot inam is concerned. No evidence has been adduced to connect the person referred to as 'the present vahivatdar' with the plaintiffs. The source of the information does not appear. There is no guarantee for its truth—no means for judging whether it was of any consequence to the inam commission to have accurate information on the subject.

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[24] Damodar v. Secretary of State, A I R 1921 Bom 367=62 I C 673 = 45 Bom 1161=23 Bom L R 492.

[25] Secretary of State v. Moment, (1913) 40 Cal 391=18 I C 22=40 I A 48=7 L B R 10 (P C).

[26] Rachangauda v. Secretary of State, A I R 1920 Bom 239=54 I C 129=21 Bom L R 1155.

The public records, contemplated in S. 35, Evidence Act, are required to be kept for the purpose of action being taken on them by the Government. The guarantees for the accuracy of entries so made are that the public officers have to make the records in the discharge of their official duty, or in the performance of a duty specially enjoined by law, and that official action is ordinarily taken on the facts recorded. The public being interested in such action, it is unlikely that facts recorded with such a purpose should be inaccurately stated, or that inaccuracies should not be rectified on the application of persons whose rights would thereby be affected. The original of Ex. 151 at the most appears to be a statement prepared from the Collector's records. It is not part of the Collector's records themselves. The statement was prepared in circumstances and for purposes of which we have no evidence. We may no doubt presume that the Inam Commission did not ask for irrelevant information and that the information was asked for the performance of their duties. But it is too much to presume that the information supplied in such a comprehensive table was asked for or required for action being taken on every detail comprised within it: nor can the statement prepared in the stated circumstances be considered such an entry as S. 35 contemplates.

It seems to me very doubtful whether the admissibility of this document can be aided by S. 13. That section refers to cases where the existence of any right or custom is in question. Here we are concerned with the existence of a right,—whether the plaintiffs' ancestors were granted the rights they claim. In deciding that question, viz., whether any right that may be in question exists,—S. 13 makes in the first place any transaction by which the right in question was claimed, recognized or asserted, a relevant fact, i. e., such a transaction may be proved. Secondly, particular instances in which the right was claimed, recognized or exercised, or in which its exercise was asserted are made relevant. What is made relevant is the transaction in the first case and the instances in the second: 58 I A 125[27] at p. 136. The transaction or instance must be one by or in which the right in question has been asserted or denied. There is nothing to show what the transaction before the Inam Commission was, or that it referred to the existence or non-existence of the pot inam. The tabular statement is neither such a transaction nor such an instance as S. 13 mentions, nor is it in itself evidence of either. The bare statement before the Inam Commission that the Collector's records contained reference to a subsidiary grant, cannot, it seems to me, be brought under the categories of the transactions and instances to which S. 13 refers. Putting aside Ex. 151 I agree that the evidence establishes that there was a subsidiary grant by the defendant's ancestors to the plaintiffs' ancestors prior to 1816.

I come next to the proceedings in 1862. In that year there was a suit by one Shivlingappa, an ancestor of the defendant, against a member of the plaintiffs' family. The defendant's ancestor claimed possession of the lands now in question. He obtained a decree. Execution proceedings were taken to enforce the decree so obtained. In accordance with Civil P. C. Act 8 of 1859, S. 229, then in force, on the decree-holder being obstructed in obtaining possession under his decree, the execution proceedings were turned into a substantive suit. This suit was against a third person who had caused the obstruction. He was a nephew of the defendant to the main suit of 1862. This nephew claimed the property in his own right through a grant to his father by the defendant's ancestors. In this, the execution suit, Shivlingappa consented in 1867 to what has been called a compromise, but what really amounted to an admission that he had no claim against the ancestors of the plaintiffs, and that the decree in the suit of 1862 in his favour could not be executed against them. The result was that the possession of the members of the plaintiffs' family was not disturbed, and they remained till January 1926, in possession of the part of the inam property which the plaintiffs claim. No adequate reason appears for ignoring the proceedings in 1867. They cannot be assumed to be obtained by fraud any more than the suit of 1862. The year

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[27] Gobinda Narayan Singh v. Sham Lal Singh, A I R 1931 P C 89=131 I C 753=58 I A 125=58 Cal 1187 (P C).

1926 brings us to the events immediately preceding the present suit. Between 1924 and 1926 the revenue authorities, at the instance of defendant 1, entertained proceedings for the eviction of the plaintiffs from the watan lands and for putting defendant 1 in possession. This action was purported to be taken under the Watan Act (Bombay Hereditary Offices Act, 3 of 1874), S. 9. The question thus arises whether in view of the events that I have narrated, viz., the pot inam granted some time prior to 1816, and the legal proceedings in 1862 and 1867, there was any power in the revenue authorities under S. 9, Watan Act, to declare the grant of the pot inam to be null and void. This question has a double aspect. Its second aspect depends upon the jurisdiction of the Court to pronounce upon the powers of the revenue authorities. That aspect I shall consider later, with reference to the Revenue Jurisdiction Act, S. 4. The Watan Act, S. 9, is somewhat involved, but omitting immaterial alternatives it may be read as follows:

> Whenever any watan has, before the date of this Act, passed otherwise than by virtue of, or in execution of, a decree or order of any British Court and without the consent of the Collector and transfer of ownership in the Revenue Records into the ownership or beneficial possession of any person not a watandar of the same watan, the Collector may declare such alienation to be null and void and order that such watan shall from the date of such order belong to the watandar previously entitled thereto.

The substantive provision of the section therefore is to give the Collector power to declare null and void what in the latter part of the section is called "such an alienation," and what is earlier referred to as a "passing of the watan into the ownership or beneficial possession of any person not a watandar of the same watan." The subsequent order is consequential on the declaration. The power to declare the alienation void is given to the Collector subject to four conditions being satisfied (though the fourth is implied in the explanation of the term "such an alienation"): (1) that the alienation has taken place before the date of the Watan Act; (2) that it has taken place otherwise than by virtue of or in execution of a decree or order of any British Court, (3) that it has taken place without the consent of the Collector and transfer of ownership in the Revenue Records, and (4) that it has resulted in the transfer of the ownership or beneficial possession of the watan to a person not a watandar of the same watan.

All these four conditions must obviously be applicable to the same transfer. It cannot be—though that was the substratum of some of the arguments—that the condition that the transfer must have been before the date of the Act, may refer to one transaction, that the condition that it must have been otherwise than by virtue of a decree may apply to another transaction, and that the condition that the transferee is not a watandar of the same watan, may be applicable to a third transaction. The transfer that is sought to be set aside must be an alienation that satisfies all the four conditions.

The plaintiffs say that the Collector at no time acquired the power of declaring the grant of the pot inam in their favour null and void. The plaintiffs' presentation of the relevant facts is, first, that the transfer in their favour was prior to 1816, so that the first condition is brought directly in operation in their favour; and the fourth condition indirectly, since by the grant they became watandars of the same watan under S. 4 of the Act. (That section includes in the definition of watandar a person holding watan property acquired by him before the introduction of the British Government into the locality of the watan, and a person holding such property from him by inheritance.) Secondly, the plaintiffs say that assuming that the grant of 1816 in their favour is not proved, then in 1867 there was a decree of the Court in their favour, and the second condition in S. 9 is unfulfilled. Thirdly, that the entries of their names in the Record of Rights enable them to take advantage of the third condition. Defendant 1's reply is full of contradictions. He denies the existence of the grant of 1816 when the fourth condition has to be faced, but he appeals to the grant of 1816 when the decree of 1867 is relied upon (second condition). Confronted with the decree of 1867, the defendant says that the watan did not in 1867 pass into the ownership or beneficial possession of the plaintiffs by virtue of the decree because the plaintiffs were already in possession by virtue of the grant in 1816; that there could not in 1867 be any passing into the ownership of the plaintiffs, inasmuch as long before —in 1816 — the lands had passed into their ownership, and that there being no transfer at all in 1867 there could not be said to be a transfer by virtue of the decree. But this defence against the second condition is an abandonment of the defence to the fourth condition. No consistent view of the facts can be presented by the defendant and no single alienation can be put forward satisfying all the four requirements of S. 9. The plaintiffs must in any case be given the benefit of either the second or the fourth condition.

In our opinion there was a grant prior to the introduction of the British Government and the decree of 1867 was not obtained by fraud; whereas the decision of the revenue authorities was on the basis that there was no grant before the introduction of the British Government (which involves that the plaintiffs are not watandars); and, secondly, that the decree of 1867 was obtained by fraud. On both these allegations we have come to contrary conclusions. The question then arises whether our view that the revenue authorities erred in respect of these two findings, is irrelevant and of no consequence; because, as argued for the appellants, the exercise of jurisdiction by the civil Courts with reference to the said two questions is barred by the Revenue Jurisdiction Act (10 of 1876), S. 4 (a), and it is no part of the function of the civil Courts to pronounce whether the decisions of the revenue authorities with respect to these two facts is or is not erroneous.

The argument takes two forms—first that the civil Courts have no jurisdiction to pronounce upon the existence or nonexistence of these facts because that would result in certain orders being set aside or avoided which the civil Courts have no jurisdiction to do, and, secondly, that even if we do pronounce upon these two facts we have no jurisdiction to pass any consequential orders. These two facts must for the purposes of this argument be brought into contact with the terms of the Revenue Jurisdiction Act, S. 4 (a). In terms the sub-section prohibits the civil Courts from exercising jurisdiction as to certain matters. The plaint must determine in what respect the plaintiff seeks that the Court should exercise jurisdiction. The suit cannot be entertained in so far as the plaint claims reliefs involving the exercise of jurisdiction taken away from the Court. I will, therefore, refer to the parts of the plaint which are relevant in view of S. 4 (a). The suit is against two defendants. Defendant 1 is the person in whose favour the plaintiffs were evicted by the revenue authorities and defendant 2 is the Secretary of State. The plaint narrates the grant of the pot inam by the ancestors of defendant 1 to the ancestor of the plaintiff; the uninterrupted possession of the lands by the plaintiffs' family; the orders of the revenue authorities "as per Watan Act"; and defendant 1 having unjustly taken possession of the lands in 1926. All the said orders of the revenue authorities are characterised as being illegal and null and void and not binding on the plaintiffs. The plaint proceeds :

> This suit has been filed for declaring that under the Watan Act the plaintiffs are watandars, as the watan lands in suit and some other lands of this watan came to the family of the plaintiffs before the advent of British rule in Murgod Mahal and for awarding into the possession of the plaintiffs as owners, the lands, in suit together with the appurtenances, and for declaring that the plaintiffs were the watandars at the time defendant 1 obtainted possession, and that they are still the watandars.

The cause of action is said to arise (1) as against defendant 1, from the date of defendant 1's wrongfully obtaining possession, and (2) as against defendant 2,

> the cause of action in respect of declaration of right arose on the day when the Bombay Government gave their final decision, i. e., on 28th May 1927.

The notice required under S. 80, Civil P. C., seems to have stated that the plaintiffs intended to sue Government for a declaration that they (the plaintiffs) are watandars, and for possession of the lands of which they have been dispossessed by the revenue authorities (Ex. 52). The effective prayers are that : (1) It may be declared that the plaintiffs were the watandars of the watan of defendant 1 at the time defendant 1 took possession of the lands in suit, and that they still are the watandars; and (2) that the lands in suit together with the appurtenances may be given into the possession of the plaintiffs as owners.

The written statements of defendants 1 and 2 are on the same lines. They both state that the suit is essentially one to set aside the orders of the revenue authorities under the Watan Act, S. 9, and is accordingly barred by the Revenue Jurisdiction Act. The assertions of the grant to the plaintiffs' ancestors by the defendant's ancestor and of the plaintiffs' being watandars of the defendant's watan are traversed, the validity, legality and binding effect of the orders of the revenue authorities are affirmed and their liability to be set aside denied. Therefore the question with reference to the jurisdiction of the Court in the light of the pleadings is, whether when an order evicting the plaintiffs from certain lands has been made by the revenue authorities, purporting to act under the Watan Act, S. 9, a suit seeking a declaration that the plaintiffs are watandars and seeking (on the basis of a grant prior to the introduction of the British Government) possession of the lands in question, is barred by the Revenue Jurisdiction Act, S. 4 (a). The dismissal of the suit is invited on the ground that such a suit is in effect a suit for setting aside an order of the revenue authorities and that such suits are barred by the sub-section.

Omitting reference to exceptions that are not now relevant, sub-s. 4 (a) provides that no civil Courts shall exercise jurisdiction as to certain stated matters, which so far as relevant for the present purposes are : (1) claims against Government relating to property appertaining to the office of any hereditary officer appointed or recognized in certain ways ; (2) claims to perform the duties of such officers, or in respect of injury caused by exclusion from such office ; (3) suits to set aside or avoid any order under the Watan Act, passed by Government, or any officer duly authorized in that behalf ; (4) claims against Government relating to lands held under treaty or to lands granted or held in other specified ways. The clauses of S. 4 (a) that can be relied upon in the present case are the 1st and 3rd. The first has not been referred to in the written statement. That clause can only be relied on if (a) the claim is against Government, (b) the claim relates to property, (c) the property to which it relates appertains to the office of a hereditary officer; (d) the said officer is appointed or recognized under the Watan Act. As an alternative to (c) and (d) the following may be substituted : "the property appertains to the office of any village officer or servant."

If it had been necessary to decide the point, I should have considered whether all the averments required by Cl. 1 had been made and proved. As it is, it is not necessary to express an opinion whether a claim for a declaration that *A* (and not *B*) is entitled to certain property, is a claim against Government. Presumably the answer would depend upon whether Government has some right or interest that would be affected if *A* (and not *B*) were the owner. But the mere fact that Government have been under the impression or have declared that *B* was the owner, would presumably not affect the question whether a claim to a declaration to the other effect is a claim against Government. Moreover for the purposes of Cl. (1) the claim has not only to be a claim against Government; it must be a claim relating to property—and a claim that the plaintiffs are watandars has been held not to be such a claim—so that obtaining a declaratory decree against the Government of their (the plaintiffs') title was held not to be barred : (1896) P J 666,[19] where many decisions are referred to including 8 Bom 25.[28] The plaintiff may be entitled to have the Secretary of State before the Court in order to try his claim to title—24 Bom 435,[16] without any direct claim being made against the Government relating to property. But, as I have said, it is not necessary to consider the bearing of Cl. (1) of S. 4 (a) on the present case, as no relief has been granted against the Government and the plaintiff has not raised any objection.

The question remains whether Cl. 3 of S. 4 (a) ousts the jurisdiction of the Court. Cl. 3 refers to suits to set aside or avoid orders under the Watan Act. The expression "a suit to set aside" some transaction on the basis of which a right is claimed, has been characterized by the Privy Council—their Lordships were dealing with a suit to set aside an adoption — as not being quite precise : 13 I A 84[29] at p. 93 and 27 I A 216.[15] In the light of those observations, the first step in an attempt to interpret Cl. 3, must be to determine precisely the nature of the jurisdiction that civil Courts would normally possess. After this step has been taken that part of the normal jurisdiction, which the civil Courts are required not to exercise, must be renounced. The residuum of the normal jurisdiction may be exercised.

What then is the extent and character of the jurisdiction that the Courts normally possess—apart from S. 4 (a)—with reference to an order passed under the Watan Act? The question, it would seem, must arise somewhat in this way. One of the parties to a suit (in the present case the defendants) would seek to rely on the order alleging the (allegation being denied by the other side) that the order created certain rights of a civil nature in their favour (Civil Procedure Code, S. 9). The Court would then require proof of the order—and would have to determine whether the order was an act of such a nature as the defendant claimed, viz., an act from which the law required that the rights claimed should flow. For this purpose the Court would have to consider the law under which the order was purported to be made : to determine whether the directions of the law had been observed, e. g., that the person in fact authorized to make the order had made it, whether he had followed the directions given by the law for making the order, whether the conditions precedent to the right to exercise the power arising had been fulfilled, and similar matters : all of which would be necessary for the preliminary purpose of deciding whether the act relied upon by the defendants was an act to which the law attributed the results alleged to result from it. But after these preliminary matters have been determined, if the Court came to the conclusion that the order followed the requirements of the law, would there be any further jurisdiction in the Court over the order ? Would the Court have jurisdiction to determine whether the officer clothed with the power to make the particular order had exercised that power wisely, or as the Court itself would have done ? — and if dissatisfied with the manner in which the power had been exercised, would the Court have power to set aside the order ? Apparently not. Unless some such revisional control were given to an external authority (such as the civil Courts), the power would prima facie be uncontrolled and not subject to revision or appeal : 14 I A 160[30] and 39 I A 197[31] at p. 200. In any case whether there is any such jurisdiction to exercise a revisional control, would presumably depend upon the nature of the power given by the Legislature to the officer empowered. It may be a power granted with an express reservation that the person aggrieved by the order may bring a suit to modify or set aside the order : *see* 24 Cal 149;[32] or such a reservation may be implied in the terms of the power. On the other hand the right to bring such a suit may be expressly or impliedly excluded. If it is reserved, there may or may not be a short period of limitation within which the revisional control may be appealed to. Or finally the power may be of such a nature that even its purported exercise is required to be questioned (if at all) within a limited time; and if not questioned and if action is taken upon it, the action is entirely validated by the lapse of the time even though the exercise of the power may initially have been quite invalid; or in fact if it had never been exercised at all but action taken as though it had : 13 I A 84[29] at pp. 94-95.

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[28] Ramchandra Dabholkar v. Anant Sat Shenvi, (1884) 8 Bom 25.

[29] Jagadamba Chowdhrani v. Dakhina Mohun, (1886) 13 Cal 308=13 I A 84=4 Sar 715 (PC).

What is important, however, is to recognise that, assuming that there is a jurisdiction in the civil Court to set aside the order, this jurisdiction to set aside the order savours of an appeal; and that this jurisdiction must be clearly differentiated from the other preliminary function of the Court, under which in the course of the exercise of its normal jurisdiction over the civil rights of the parties, it has to determine whether it ought to take cognizance of the order; and for this latter purpose to determine whether what is put forward as an order of a particular kind conforms with the requirements of the law empowering such orders to be made : that what is put before it is what it purports to be—an order made by a person authorized to make it. The Court cannot treat something as an order under S. 9 merely because one of the parties asserts that it is so. It must determine this question for itself. This latter function is obviously one that can never be taken away from any Court whose duty it is to enforce the civil rights of the parties affected by the order : though of course the scope of this function must depend upon the nature of the power to make the order. Since the Court has to enforce those rights, and since the order affects those rights, the Court must take cognizance of the order and satisfy itself that it is what it is alleged to be or what it purports to be. This function is not revisional. It does not permit a reconsideration of the order or allow it to be altered, still less set aside. The Court performing this preliminary function does not pronounce whether the power given by the law was exercised wisely or unwisely, but whether the occasion when it could be exercised arose at all, and whether it was exercised by the person in fact authorized to exercise it; and where the person is so authorized only subject to certain conditions being fulfilled, the Court in performing this preliminary function has also to pronounce whether those conditions are fulfilled. The preliminary function to examine and determine that there is an order, is entirely different from the jurisdiction to revise or sit in appeal over the order, and if thought proper to set it aside.

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[30] **Meenakshi Naidoo v. Subramaniya Sastri, (1887) 11 Mad 26=14 I A 160 = 5 Sar 54 (P C).**

[31] **Rangoon Botatoung Co. v. The Collector, Rangoon, (1912) 40 Cal 21=16 I C 188=39 I A 197 (P C).**

[32] **Laloo Singh v. Purna Chandra Banerjee, (1896) 24 Cal 149.**

The expression "set aside or avoid an order" is appropriate only to the revisional jurisdiction. It is not appropriate to the preliminary function which forms a necessary part of the duty to take cognizance of the order and which is restricted to the determination of such questions as whether the authority to exercise the power in question had come into existence. The decisions in 13 I A 84[29] and 27 I A 216[15] make this clear. Their Lordships distinguish setting aside an adoption from obtaining a declaration that an alleged adoption is invalid or never in fact took place. Their Lordships point out that in the case of an adoption, speaking to the Court setting it aside is misleading, as the Court can never set aside an adoption once made, i. e., validly made. All that the Court has to do is to exercise what I have called the preliminary function of determining whether the person who purported to make the adoption had authority to do so, whether the authority was exercised in the form required by law, and similar questions; but the Court cannot sit in appeal and determine whether the person authorized to adopt ought to have exercised the authority at all, or exercised it in respect of the person adopted or whether he ought to have selected another person. The case is different with a court-sale which the Court is authorized to set aside : 27 I A 216.[15]

It would therefore seem that there is a want of precision, if it is assumed that the terms of S. 4 (*a*), Cl. (3), must necessarily be applicable to every order made under the Watan Act : for that is assuming that normally the civil Courts possess some revisional jurisdiction with respect to every such order, — which normal jurisdiction the section takes away. It cannot be assumed that normally there exists a jurisdiction in the Court to revise or set aside or avoid an order made by an officer authorized to make it. The reservation or exclusion of such a revisional jurisdiction in the civil Court would prima facie depend upon the terms of the law authorizing the order to be made; upon the effect that the order is required to have; and upon whether the efficacy and force of the order is unconditional or subject to steps not being taken in the civil Courts to modify it or to set it aside or to avoid it. Such an assumption that S. 4 (*a*) must apply to every order under the Watan Act—unwarranted though it be — results in the tendency to begin with the premise that some jurisdiction has been taken away by S. 4 (*a*), and from this unwarranted premise to draw the erroneous conclusion (particularly in cases where the revisional jurisdiction has never been brought into existence) that what is taken away is that preliminary function, — which must in reality always remain in the Court in order that it may enforce orders required by the Legislature to be enforced.

The tendency to which I have referred is intensified by the fact that in discharging what I have called the preliminary function, both the civil Court and the Collector have to cover the same ground. The Collector must necessarily perform this preliminary function because he must determine for himself whether the conditions on which he is empowered to act exist. Speaking with reference to the present case, before the Collector could proceed to consider whether or not to declare the alienation to be null and void, he had to determine for himself whether the pot inam had been granted to the plaintiffs' ancestors prior to the introduction of the British Government into the locality of the watan. But to make an order embodying his determination of this preliminary question is not the power granted to the Collector : the power granted to the Collector is to declare the alienation null and void. In the exercise of his power under S. 9 what he has to pronounce in the form of a declaration is that the alienation is null and void : the declaration is not to be an embodiment of his views with reference to the four conditions precedent; he is not empowered to declare that the alienation should be deemed to have been made after the date of the Act or that the alienee shall or shall not be deemed to be a watandar. The Collector is undoubtedly under the duty to determine whether the preliminary circumstances exist on which his authority depends. But this duty arises merely by implication from his being authorized to make the order in the stated circumstances: *See* (1858) 11 Moor P C 347,[33] where the maxim *quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest* is cited and explained by the Chief Justice (whose judgment was approved) in these terms (p. 360):

> Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment;

but its limitations are also pointed out, where the maxim comes to be applied adversely to the interests of others. The primary function imposed upon the Collector is to declare the alienation void. The Legislature may no doubt be assumed to have conceded that the Collector may be taken away from his ordinary duties for the comparatively short time that might be required for determining in a prima facie manner whether the preliminary circumstances exist, whose existence gives rise to his primary function of making the declaration. But it does not seem to me to be reasonable to assume that the Legislature contemplated that the function of finally determining upon the existence of such preliminary circumstances should be performed not by the civil Courts whose duties and equipments are adapted to the determination of such questions, and who may be expected to deal expeditiously and surely with matters familiar to themselves; nor does it seem to me to be reasonable to assume that the Legislature required that the Collector should be drawn away from his own legitimate and urgent duties to their detriment in order to perform unfamiliar functions extraneous to his usual avocations. When this distinction—between the preliminary function of determining that there is an order affecting civil rights, and the jurisdiction to set aside or otherwise interfere with the order—is borne in mind, it seems to me that an explanation for the conflict of decisions is to a great extent obtained and (with great respect) their correctness can be tested with some degree of confidence.

The failure to distinguish between the preliminary function to which I have referred and jurisdiction to set aside an order leads to conclusions that must be recognized to be beyond all the bounds that may reasonably be attributed to the Legislature, though "an Act diminishing a common right cannot safely be given, by judicial construction, an operation going beyond the plain intention of the Legislature"—8 Bom H C R 219[34] at p. 227, and such enactments are subject to strict construction: 27 Bom 221[35] at p. 227. Thus, it has been held that if the Collector has made an order on the basis of a certain person not being a watandar, the civil Courts have no jurisdiction to determine that question for themselves; that they cannot make a declaration that he is a watandar, since to do so would be refuting or avoiding or setting aside the Collector's order: *See F. A. No. 269 of 1918.*[4] In testing the cogency of this reasoning it is to be observed that S. 4 (a) is not restricted in its terms, as S. 11, Civil P. C., is. The prohibition in S. 4 (a) to exercise jurisdiction is unlimited. It is not confined to fresh adjudication between the same parties. Nor is it subject to any other similar limitations. Once the Collector has made the order, the civil Court's jurisdiction—to the extent to which it is taken away—is taken away absolutely and for ever. And if the existence of the order deprives the civil Court of jurisdiction to decide facts on the basis of which the order is made, then the civil Court's jurisdiction to determine the pedigree or relations between the parties would be lost, not only as between the parties themselves but between all others; for otherwise the validity of the Collector's decision would be endangered—it might be refuted. Again once a Collector declares between *A* and *B* that the British Government was introduced in a certain locality on a certain date, that question would be withdrawn from the jurisdiction of the civil Court for all time, for all purposes and between all parties. These extravagant results follow from giving immunity not merely to the order of the Collector made where the conditions exist on which alone he is authorized to make the order, but to his opinions on other matters. But in fact the Collector's order has the efficacy given to it only after he enters the charmed circle. The circumference of that circle is rigidly defined by the section.

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[33] Fenton v. Hampton, (1858) 11 Moor P C 347 =6 W R 341.

[34] Sakharam Adhikari v. Collector of Ratnagiri, (1871) 8 Bom H C R 219 (F B).

[35] Tribhovan v. Ahmedabad Municipality, (1902) 27 Bom 221=5 Bom L R 48.

The reasoning on which I have proceeded seems to me to be supported by decisions of the Privy Council to which I have referred, and the judgments of Sir Lawrence Jenkins, C. J. and Parsons, J., in *Surannanna* v. *Secy. of State.*[16] As there is so much conflict of authority, I will refer more fully to *Malkarjun* v. *Narhari,*[15] the more so as the sentence "a Court has jurisdiction to decide wrong as well as right" has been cited as supporting the view that the Collector had authority to decide wrong as well as right, and that therefore whether he had authority to decide at all cannot be questioned. A Court that has authority to decide a question has certainly authority to decide it wrongly, or in a manner that may appear wrong to another. But the question whether the decision (assuming it to be wrong) is liable to be corrected or to prevail uncorrected, is quite different and depends on entirely different considerations from the question whether the Court was ever called upon and authorized to pronounce the decision. The judgment of Lord Hobhouse is based on this distinction.

In *Malkarjun's case,*[15] the question was whether the plaintiffs were bound by a sale in execution of a decree. The execution Court had held the sale with admitted irregularity; but the question was whether it was necessary to set aside the sale before the plaintiffs could have any relief. The plaintiffs argued that it was not necessary to set aside the sale, and they had refused and neglected (in spite of warnings) to pray that it be set aside. In the first part of their Lordships' judgment they considered in what circumstances the sale could be treated as a nullity, so that it need not be set aside at all. In doing so their Lordships performed the preliminary function of deciding whether there was, in the eye of the law, any sale at all. "If the sale is a reality at all, it is a reality defeasible only in the way pointed out by law: *Malkarjun* v. *Narhari*[15] at p. 230. For the purpose of performing this preliminary function they considered whether the matter of the sale was properly before the Court, whether its powers as an executing Court came into play; whether the position was such that to receive the application for execution which was made to it was part of the Court's jurisdiction. If these conditions were not satisfied, the purported sale was an absolute nullity; the Court which held the sale was never entitled to hold it: so that the plaintiffs were entitled to proceed as if the sale had never taken place: and the fact that the plaintiffs persisted in refusing to seek the remedy that the sale be set aside, would not have come in their way. The jurisdiction of the Court executing a decree does not depend upon the requirements of a single section being followed out, whereas the authority of the Collector to make an order under S. 9, Watan Act, does. The question before the Privy Council, therefore, whether there was a sale that required to be set aside, depended on many more and less easily determinable circumstances than the question whether the four conditions contained in the Watan Act, S. 9, are satisfied, and whether consequently there is or there is not an order under S. 9. But the Privy Council held in *Malkarjun's case*[15] that the events had taken place after which to receive the application for execution became part of the Court's jurisdiction: the determinative event giving jurisdiction being the establishment of the debtor's liability. The Court had jurisdiction (so their Lordships held) to receive the application and either to reject it as defective or to order some further proceeding: it did not reject it, but (mistakenly) proceeded with it; in doing so it was exercising the jurisdiction with which it was already clothed.

What is significant for the present purpose is that the Privy Council did not reason that the suit was not for setting aside the sale, and that consequently the Court could not perform the preliminary function of deciding whether there was a sale at all—of deciding whether the jurisdiction to hold a sale had ever been acquired. Nor did they deem that a decision to the effect that the Court had erroneously conceived itself to be authorized to proceed with the sale would amount to setting aside the sale. They considered these preliminary questions to be entirely different from the questions involved in setting aside the sale. They accordingly distinguished 9 Bom 86[36] where the Court had not established the debtor's liability and where consequently the preliminary conditions for acquiring jurisdiction to sell had not arisen.

Lord Hobhouse on p. 226 points out the distinction between the two cases: (1) that where the Court has jurisdiction to set aside the sale—to pronounce whether the jurisdiction or authority to sell has been rightly exercised; and (2) where the Court is merely performing the preliminary function of determining whether the jurisdiction or power of ordering the sale which had been purported to be exercised ever came into existence. In the former case it is of little importance to distinguish whether the appellate Court interferes on the ground that the execution Court had no jurisdiction at all, or whether it had jurisdiction which it had exercised wrongly. But the distinction becomes important in the second case where the only jurisdiction possessed by the Court consists in its preliminary function: as happens in cases where the other appellate or revisional jurisdiction is barred by limitation, or by some such section as S. 4 (a) or by the terms of the authority conferred on the officer or on the Court exercising it, or as in *Malkarjun's case*,[16] because the plaintiff refuses and neglects to pray that the Court should exercise its revisional jurisdiction.

I need only refer to one case out of the many conflicting decisions of this Court. In 24 Bom 435[16] the judgments are carefully reasoned out and seem to refer to all the relevant considerations. The question there arose out of an order by the Collector purported to be made under the Bombay Land Revenue Code (Bom. 5 of 1879, S. 37). The power under this section makes it

> lawful for the Collector to dispose of all lands wherever situated which are not the property of individuals in such manner as he may deem fit, subject always to all rights of the public or of individuals legally subsisting.

The Collector made an order on the footing that the land was not the property of individuals. Jenkins, C. J. and Parsons, J. held that it was for the Court to decide whether the land was not the property of individuals, because the authority of the Collector to dispose of the land arose with reference only to lands that did not belong to individuals, and the preliminary function of the Court to decide whether the facts existed on the basis of which the Collector was authorized to dispose of the land was different from the jurisdiction of a revisional nature under which the Court is authorized on an application within a year of the order to set aside the order. The argument with which Jenkins, C. J., deals in the following passages has been put forward before us with reference to the absolute bar to jurisdiction imposed by S. 4 (a), p. 444: Sir Lawrence Jenkins said:

> An individual, who asserts that a Collector has disposed of property which belongs to him, and consequently does not come within the operation of S. 37 is entitled to have his title to the property tried in ordinary Courts; if he succeeds in establishing his claim, the disposition by the Collector would be so much waste paper, and it would be unnecessary to set it aside.

Then on p. 445 he says:

> If I am right in this view, it would follow that Art. 14 has nothing to do with the case. But then it has been argued that, if Art. 14 does not apply to an order such as that of November 1895, there is no order under this section to which it could apply. This argument however appears to me to be fallacious; for it proceeds on the assumption, that it is for some reason necessary that there should be some order under this section on which Art. 14 would apply; as though Art. 14 had the right to demand that there should be an order under S. 37, Land Revenue Code, on which it should operate. But if, for some reason which I cannot appreciate, Art. 14 is entitled to demand a tribute from S. 37, I conceive there would be no difficulty in that section paying its dues. Even a Collector may so dispose of land, which by the section is declared to belong to Government, as to interfere with the rights of others, and in that case it would be proper to have this disposition set aside.

The real issue between Candy, J.'s judgment and Sir Lawrence Jenkins's seems to be that on p. 449. Candy, J. seems (with all respect) to overlook both in this case and in 15 Bom 424[37] at p. 429 that if however 'formally,' *X* puts *B* into possession of property belonging to *A*, and orders *A* to be dispossessed, *A* can sue *B* for his property on his title; and *B* would have no defence against *A's* claim for possession, unless *B* could establish to the satisfaction of the Court that *X* had a right superior to that of *A*, by virtue of which *X* could put *B* into possession. For determining this question the Court must determine what powers *X* possessed. *A* could lose his right only by adverse possession or by superior title. Candy, J. does not distinguish between the preliminary function of the Court and the revisional or appellate jurisdiction to set aside, to which I have referred. In my opinion therefore though an order had been made by the revenue authorities purporting to act under the Watan Act, S. 9, still a suit seeking a declaration that the plaintiffs are watandars and seeking possession of the lands from which the plaintiffs have been evicted in consequence of that order, is not barred by the Revenue Jurisdiction Act, S. 4 (a). The Revenue Jurisdiction Act saves only "any order under the same, viz., the Watan Act, by an officer duly authorized in this behalf": the Watan Act does not give authority to declare who shall be watandar, but to declare certain alienations to be void ; the authority under S. 9 arises only on the four conditions mentioned therein being satisfied ; the civil Courts have no jurisdiction to pronounce whether such orders as the revenue authorities are authorized to make are rightly made ; but if in the course of determining the civil rights of the parties, the Court has to determine whether such rights have been affected by what is put forward as an order under S. 9, it becomes the duty of the Court to pronounce whether the order in question can be brought within the terms, "an order under the Watan Act made by an officer duly authorised in that behalf ;" and the Court cannot hold it to be such an order unless at the time when the officer purports to make the order the officer was duly authorized in that behalf; and he would not be so authorised unless the four conditions existed which give rise to the authority of the officer. For these reasons I agree that it may be declared that the plaintiffs are watandars, that there was a grant of a pot inam in their favour, that the Collector had in the circumstances no authority to make an order under the Watan Act, S. 9, and consequently that defendant 1 cannot resist the plaintiffs' claim for possession. The appeal must consequently be dismissed with costs.

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[36] Baswantapa Shidappa v. Ranu, (1885) 9 Bom 86.

[37] Nagu v. Salu, (1890) 15 Bom 424.

W.D./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 326

BROOMFIELD AND TYABJI, JJ.

Govindbhai Lallubhai Patel — Plaintiff — Applicant.

v.

Dahyabhai Nathabhai Patel and *others* — Defendants — Opposite Parties.

Civil Appln. No. 188 of 1936, Decided on 7th August 1936.

(a) Civil P. C. (1908), S. 110—Valuation of suit—Suit for declaration as to whole property and possession of comparatively small item of property—Suit valued at amount less than Rs. 10,000 in trial as well as appellate Court—On petition for leave to appeal to Privy Council, plaintiff claiming that matter in dispute was of value more than Rs. 10,000 —Suit being mainly for declaration, suit as a whole can have notional valuation for purposes of jurisdiction—Plaintiff is not estopped from showing in such case that value of subject matter in suit or appeal was more than Rs. 10,000.

Where the plaintiff sues for a declaration of his title to certain property as a whole, praying at the same time for possession of a comparatively small item of such property, the suit being mainly for declaration, the suit as a whole can have a notional valuation for purposes of jurisdiction inasmuch as a prayer for declaration can be valued only on a notional basis. If in such a suit the plaintiff, puts in his own valuation at an amount less than Rs. 10,000 and this valuation is reiterated in appeal and on the High Court dismissing his suit, he files an application for leave to appeal to Privy Council claiming that the value of the subject matter was more than Rs. 10,000, he is not in such a case estopped, by the rule that a man cannot approbate and reprobate, from showing that the value of the subject matter of the suit and appeal was Rs. 10,000 or over within the meaning of S. 110, Civil P. C.: *A I R 1916 Bom 66* and *1 I A 317 (P C)*, *Rel. on.* [P 328 C 2; P 329 C 1]

(b) Civil P. C. (1908), S. 110—Interpretation —Words "some claim or question to or respecting property" in S. 110 (2) mean claim or question to or respecting property additional to or other than actual subject matter in appeal.

The words "some claim or question to or respecting property" in S. 110 (2), Civil P. C., must be interpreted to mean some claim or question to or respecting property additional to or other than the actual subject matter in dispute in the appeal : *A I R 1916 Mad 985* and *A I R 1930 P C 44*, *Rel. on*; *A I R 1916 Bom 66* and *A I R 1926 Bom 265*, *Expl.* [P 329 C 1]

(c) Suits Valuation Act (1887), S. 8—Scope —Suit for declaration and possession—S. 8 has no application to such suit—In such suit value for fiscal purposes is not same as value for jurisdiction—Value therefore for jurisdiction is real value of subject matter in view of O. 7, R. 1 (1), Civil P. C.

Where a suit is for declaration and possession, in so far as the suit is for a declaration, S. 8, Suits Valuation Act, has no application since that section is restricted to suits in which court-fees are payable ad valorem and the Court-fee in a suit for a declaration is not payable ad valorem but a fixed fee is payable. In so far as relief of possession is concerned the suit is to be valued for fiscal purposes under S. 7, para. 5, Court-fees Act, but such suits are excepted from the operation of S. 8 as stated therein and so S. 8 has no application in this case also. Therefore in a suit seeking declaration and possession, the value for fiscal purposes is not to be the value for purposes of jurisdiction. The value for jurisdiction in such a case is to be the real value of the subject matter in view of O. 7, R. 1 (1), Civil P. C. [P 332 C 2; P 333 C 1]

(d) Evidence Act (1872), Ss. 21 to 23 and 115—Statement in plaint giving value of suit for jurisdiction may be admission under Ss. 21 to 23—But it cannot amount to estoppel unless proved to have been made with intention of causing and permitting defendant to believe it to be true and act on such belief—Estoppels must be specifically pleaded and strictly proved. (Per *Tyabji, J.*)

(Per *Tyabji, J.*)—The statement in the plaint that for the purpose of jurisdiction the value of the suit is of a particular value may be taken as an admission under Ss. 21, 22 and 23, Evidence Act. But an estoppel under S. 115 is a very different thing. For raising an estoppel, the declaration, act or omission must be made with the intention of causing or permitting another person to believe a thing to be true and act upon such belief. Estoppels must be specifically pleaded and strictly proved. They operate between the person making the declaration and the person believing and acting upon it and the representatives of those persons. Therefore before an estoppel can be relied upon, it will in the first place have had to be alleged and proved that the plaintiff intentionally caused the defendant to believe that the subject matter of the suit was less than Rs. 10,000 and not more : *15 Bom L R 1021; A I R 1932 Bom 111* and *A I R 1927 Bom 83, Ref.* [P 333 C 2]

M. R. Jayakar and *P. A. Dhruva* — for Applicant.

G. N. Thakor and *U. L. Shah* — for Opposite Parties.

Broomfield, J.—This is an application for leave to appeal to the Privy Council by the unsuccessful plaintiff in First Appeal No. 31 of 1932. The main question is whether the property is of the appealable value. The plaintiff claimed to be the owner of immoveable properties in the Narwadari village of Ode in the Anand Taluka, under the will of one Desaibhai. In the first instance he filed his suit in the Court of the Second Class Subordinate Judge, Umreth, claiming a declaration that he is the owner of various properties specified in the plaint, an injunction restraining the defendants from interfering with his possession, possession of specified properties from the defendants, one-third share in certain properties sold by the defendants and Rs. 2,400 for mesne profits for three years of the properties in the possession of the defendants. The suit was valued as follows : Rs. 130 for the declaration and injunction, Rs. 333 for plaintiff's share in the price of the properties sold, Rs. 2,400 for the mesne profits, Rs. 1,300 as the market value of the properties in the possession of the defendants, total Rs. 4,163.

Objection was taken that the suit had been undervalued and that the Second Class Subordinate Judge had no jurisdiction. In their written statement the defendants contended that the value of the suit property was over Rs. 50,000 and the value of the property in the actual possession of the defendants was more than Rs. 5,000. Issues were raised as to the Court's jurisdiction to hear the suit and as to the value of the suit properties, and evidence was taken on these issues. The plaintiff produced witnesses and documents to show that the value of the property was only Rs. 50 to Rs. 200 per bigha. The defendants produced evidence to show that the value was Rs. 500 to Rs. 1,200 per bigha. The trial Judge estimated the value at about Rs. 400 per bigha or more. He recorded no definite finding as to the value of the subject matter except that it exceeded Rs. 5,000 which was the only point he had to decide. The plaint was then returned and presented in the Court of the First Class Subordinate Judge. The valuation was then Rs. 9,760-5-6 which was made up as follows: Rs. 200 for declaration and injunction, Rs. 4,427-5-6 for possession of the properties in defendants' possession calculated at seven and a half times the assessment, Rs. 333 for plaintiff's share of the price of the properties sold and Rs. 4,800 for mesne profits. In para. 12 of his plaint the plaintiff stated that for the purpose of jurisdiction the valuation was Rs. 9,765-5-6 and for the purpose of court-fees Rs. 9,760-5-6. Why there was a difference of Rs. 5 between the two it does not appear. Possibly it may have been a mistake.

The suit was dismissed by the trial Court. The plaintiff appealed valuing his claim in appeal at Rs. 9,760-5-6 for all purposes. The appeal was dismissed. Then comes this petition for leave to appeal, praying that a certificate should be issued under S. 110, para. 1, Civil P. C., that is to say, a certificate that the amount of value of the subject matter of the suit in the Court of first instance, and of the matter in dispute on appeal to His Majesty in Council is more than Rs. 10,000, and also a certificate that the appeal involves a substantial question of law, this Court having confirmed the decree of the trial Court.

Mr. Jayakar, who appears for the petitioner, relies on the Second Class Subordinate Judge's estimate of the value of the property and on the statements in para. 2 of the petition affirmed on affidavit, according to which the plaintiff's share in the estate at the Second Class Subordinate Judge's valuation per bigha would come to about Rs. 72,000. The difficulty in the petitioner's way is that he has himself valued the suit and the appeal at less than Rs. 10,000. Mr. Jayakar says however that this was merely a notional value which does not represent the value of the subject matter within the meaning of S. 110. He relies on 40 Bom 477,[1] 54 All 941,[2] 7 M I A 428[3] and 1 I A 317.[4] The facts in *Mohanlal Nagji* v. *Bai Kashi*[1] were these. A suit for a declaration and injunction, in which the claim was valued at Rs. 135 was tried by a Subordinate Judge of the Second Class. The decree was confirmed by the District Judge, but reversed by the High Court on second appeal. The plaintiff having applied for leave to appeal to the Privy Council, the defendant contended that as the plaintiff himself had elected to value his suit at only Rs. 135, and conducted it in the Court of the Subordinate Judge, the limit of whose pecuniary jurisdiction was Rupees 5,000, he could not contend that the subject matter of the suit was worth Rupees 10,000. It was held by this Court, overruling the contention, that the suit being one for a declaration and injunction, the plaintiff, by suing in the Second Class Subordinate Judge's Court, made no representation directly or indirectly to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allowed him to do, he placed upon the relief which he was seeking.

Mr. Thakor, who appears for the opponents, argues that the valuation for court-fees was a notional valuation but the valuation for jurisdiction was not. So far as the suit was a suit for possession, it came under S. 7 (5), Court-fees Act, under which the court-fees are seven and a half times the assessment. But the valuation for jurisdiction is not the same, S. 8, Suits Valuation Act, not applying to a claim for possession of immoveable property. Jurisdiction depends on the value of the subject matter, Bombay Civil Courts Act, Ss. 24 and 26; and under O. 7, R. 1, the plaint has to contain a statement of the value of the subject matter for jurisdiction and court-fees separately. The plaintiff did actually give separate valuations in para. 12 of his plaint. Mr. Thakor contends that as the plaintiff chose to value the subject matter of his suit at less than Rs. 10,000, he cannot now turn round and say that the value is more than Rs. 10,000 in order to get a right of appeal to the Privy Council. The cases relied upon by Mr. Jayakar are, he says, not suits for possession and are no authority for holding that in such suits, i. e., in suits for possession, it is open to a plaintiff to say that the value he has placed on his claim is only the fiscal value and not the value of the subject matter within the meaning of S. 110.

Of the cases cited by Mr. Jayakar, two at any rate *Mohun Lall Sookul* v. *Bebee Doss*[3] and *Baboo Lekhraj Roy* v. *Kanhya Singh*[4] were in fact concerned with suits for possession of property. Nevertheless, there might, in my opinion, have been considerable force in Mr. Thakor's arguments if this had been a suit for possession simply or a suit for a declaration of a title with an alternative prayer for possession of the whole property. If that had been the case, it might perhaps have been said that the plaintiff had elected to put a valuation on the subject matter of his suit which he could not afterwards change, on the principle laid down in 1 I A 84.[5] But the actual facts are that, although the declaration prayed for by the plaintiff related to the whole of the property, the prayer for possession related only to comparatively few items. The prayer for a declaration could only be valued on a notional basis, and in the present case that means that the suit as a whole could only have a notional valuation even for the purposes of jurisdiction. That being so, the principles laid down in *Mohanlal Nagji* v. *Bai Kashi*[1] and *Baboo Lekhraj Roy* v. *Kanhya Singh*[4] seem to me to apply to the case and the plaintiff is not estopped nor barred by the rule that a man cannot approbate and reprobate from showing that the value of the subject matter of the suit and the appeal is Rs. 10,000 or over within the meaning of S. 110.

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[1] Mohanlal Nagji v. Bai Kashi, A I R 1916 Bom 66=37 I C 371=40 Bom 477=18 Bom L R 469.

[2] Kisan Chand v. Lachhmi Chand, A I R 1933 All 15=143 I C 450=54 All 941=1932 A L J 838.

[3] Mohun Lall Sookul v. Bebee Doss, (1857-59) 7 M I A 428=1 Suther 458=1 Sar 739 (P C).

[4] Baboo Lekhraj Roy v. Kanhya Singh, (1873) 1 I A 317=3 Sar 373 (P C).

[5] Kristo Indro Saha v. Hurromonee Dassee, (1873) 1 I A 84=3 Sar 317 (P C).

Mr. Jayakar also argued that his case could be brought under para. 2 of S. 110, which allows an appeal to the Privy Council where the decree or final order involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000 or upwards. As I have mentioned, there is no prayer in the petition for the grant of a certificate under this part of S. 110. Apart from that however it appears to me that para. 2 has no application to the present case. Mr. Jayakar's argument is this. Even on the footing that the value of the original suit was Rs. 9,760 only, the decree of this Court involves a claim or question to or respecting property of the value of Rupees 10,000 and upwards, by reason of the fact that mesne profits were claimed from the date of the decree of the trial Court. If this Court had reversed the decree of the trial Court instead of confirming it, the mesne profits would have amounted to thousands of rupees. I think this argument is based on a misconception of the scope of para. 2 of S. 110. According to 39 Mad 843,[6] the words "some claim or question to or respecting property" must be interpreted to mean some claim or question to or respecting property additional to or other than the actual subject matter in dispute in the appeal. Mr. Jayakar says that the Bombay High Court has not taken this view of para. 2. But *Mohanlal Nagji* v. *Bai Kashi*[1] and 50 Bom 160[7] the only cases which he has cited in that connexion, are not, in my opinion, necessarily inconsistent with it. On the other hand, *Subramania Ayyar* v. *Sellammal*[6] has been generally approved, though possibly not specifically on this point, by the Judicial Committee in 57 I A 56.[8] I may say with respect that I agree with the reasoning in the Madras case. Mr. Jayakar's argument would apparently mean that if there were an increase in the value of the property between the date of the trial and the date of the appeal, so that property which was worth less than Rs. 10,000 at the time of the original suit was worth more than that sum at the time of the appeal, there would for that reason be a right of appeal to the Privy Council. That, I think, would be a result which the Legislature evidently did not intend. However the question of the application of para. 2 is not really material, because we are of opinion that the present case comes under para. 1 of S. 110.

Mr. Jayakar submitted that if this Court were not satisfied with the evidence as to the value of the subject matter, an inquiry should be directed under R. 5 of O. 45. But we hold that this is not necessary in view of the opinion expressed by the Second Class Subordinate Judge after inquiry, and the statements made in the petitioner's sworn application, which have not been controverted. Mr. Thakor for the opponent did not contend that the property is not in fact worth more than Rs. 10,000. His argument was in effect that the petitioner was estopped from asserting that that was the value. I have already mentioned the circumstance that in their written statement in the original Court the defendants themselves alleged that the property in suit is worth more than Rupees 50,000. There can be no doubt whatever in my opinion that the case involves a substantial question of law as to the construction of Desaibhai's will. We accordingly certify that the value of the subject matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and that the value of the subject matter in dispute on appeal to His Majesty in Council is the same sum or upwards, also that the appeal involves a substantial question of law. Costs costs in the appeal.

Tyabji, J.—I agree. The question depends upon the construction of the Civil

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[6] Subramania Ayyar v. Sellammal, A I R 1916 Mad 985=31 I C 296=39 Mad 843=30 M L J 317.

[7] Seshagiri Shambhulinga v. Manjayya, A I R 1926 Bom 265=94 I C 755=50 Bom 160=28 Bom L R 454.

[8] Mangamma v. Mahalakshmamma, A I R 1930 P C 44=121 I C 513=57 I A 56=53 Mad 167 (P C).

Procedure Code, S. 110. It is admitted with reference to para. 3 of the section that the appeal must involve some substantial question of law before the case can be certified to be a fit one for appeal to His Majesty in Council. As to the existence of this requirement, I entirely agree with my learned brother and I have nothing to add. The construction of the first two paragraphs of S. 110 causes much greater difficulty. Para. 1 contains two requirements to be satisfied before the certificate can be granted, viz. : (1) the amount or value of the subject matter of the suit in the Court of first instance must be Rs. 10,000 or upwards ; and (2) the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards. Thirdly, para. 2 supplies an alternative : the decree or final order must involve directly or indirectly some claim or question respecting property of the like amount or value.

Paragraph 2 may grammatically be construed : (a) as offering a single alternative requirement instead of the two requirements contained in para. 1 ; or (b) as supplying an alternative to each of the two requirements respectively contained in para. 1 ; or (c) as an alternative only to the second of the two requirements contained in para. 1.

In this third case the first requirement of para. 1 may either be considered to be left untouched by para. 2, so that the first requirement must be satisfied irrespective of para. 2, or it may be considered to be rendered unnecessary in case para. 2 is satisfied. This latter form of alternative (c) is the same as alternative (a). To put it in other words, para. 2 may be read (1) either as one composite alternative to the whole of the first paragraph, or (2) as supplying an alternative to each of the two requirements contained in para. 1, or (3) as an alternative only to the second of the two requirements in para. 1—in which case the first requirement may either be considered to be left unaffected as though para. 2 had not been enacted, or it may be considered that the first requirement need not be satisfied if para. 2 is brought into operation : so that we come to the same construction as para 1. There are difficulties in any of these constructions being adopted. In 57 I A 56[8] Lord Dunedin held that para. 2 does not provide such an alternative to the first of the two requirements contained in para. 1 as to permit the amount or value at the date of the decree of the Court of first instance to be taken into account, instead of the amount or value at the institution of the suit. After referring to a prior decision of the Privy Council in 29 I A 40[9] Lord Dunedin says :

> In that case the amount recoverable even under the decree in the first Court did not amount to Rs. 10,000, so that the present position did not arise,

i.e., the position did not there arise whether in computing the amount or value of the subject matter of the suit in the Court of first instance, interest had to be calculated not merely up to the date of the suit but up to the date of the decree. The question therefore was whether interest accrued between the date of the suit and the date of the decree in the Court of first instance could be taken into account for the purposes of the first requirement of para. 1. Lord Dunedin proceeds :

> The question did however arise in India, and the Calcutta: *see* 33 Cal 1286[10] and Madras Courts gave contrary decisions. Their Lordships consider that the Madras Court was right. The case is 39 Mad 843.[6] In that case the question was as to mesne profits. If mesne profits from the date of the institution of the suit to the date of the decree were added, the sum of Rs. 10,000 was exceeded, *secus* if not. The Courts held that they could not be added, and their Lordships agree with their reasoning, which, indeed, treated the question under the first part of the section as completely clear, but considered whether the second part, 'or the decree or final order must involve', etc., made any difference, and held that it did not, for reasons which commend themselves to their Lordships.

In other words Lord Dunedin held that para. 2, S. 110 could not be read as providing an alternative to the first requirement in para. 1 : he held that instead of the words "the amount or value of the subject matter of the suit in the Court of first instance" it was not permissible to substitute the words taken from para. 2 "the decree must involve directly or indirectly some claim or question to or respecting property of like amount or value". If either of these two alternatives had been available, then in the place of the words 'the value of the suit' occurring in the first requirement of para. 1 the words of para. 2 'the decree must involve' could have been substituted—and then the interest (or mesne profits) up to the date of the decree and not merely up to the date of the suit, could have been taken into account. It was held however that the subject matter of the suit in the Court of first instance, which has to be valued, must mean the subject matter of the suit at the time when the suit is brought — so that subsequent accretions cannot be added.

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[9] Moti Chand v. Ganga Pershad Singh, (1902) 24 All 174=29 I A 40=8 Sar 247 (P C).

[10] Dalgleish v. Damodar Narain, (1906) 33 Cal 1286.

The difficulty in reading Para. 2 as furnishing a separate alternative for each of the two requirements in Para. 1 — viz., as furnishing alternatives both (1) for the value of the subject matter of the suit in the Court of first instance, and (2) for the value of the subject matter in dispute in appeal,—is caused by the fact that Para. 2 speaks of "the decree or final order involving, etc.", and the first words of S. 110 expressly restrict its own provisions to the cases mentioned in Cls. (a) and (b), S. 109,—clauses which together include only cases of appeals from a decree or final order passed on appeal, or by a High Court in the exercise of original civil jurisdiction ; so that the words 'decree or final order' in Para. 2 must mean the decree or final order from which an appeal is sought to the Privy Council : and if so, the alternative in S. 110, Para. 2 cannot be taken as an alternative to the first requirement in Para. 1, except possibly in the somewhat special cases of decrees or final orders of the High Court exercising its original civil jurisdiction, where appeals are permissible from them direct to the Privy Council (Letters Patent, Cls. 39, 15). I observe on the other hand that Lord Dunedin seems to restrict the function of the first line of S. 110 to that of indicating under which of the cases mentioned in S. 109 the appeal to His Majesty falls, so that Para. 2, S. 110 may in this way be perhaps construed so as to refer both (1) to the decree or final order in the Court of first instance, and (2) to the decree or final order in respect of the amount or value in dispute on appeal to His Majesty in Council. But Lord Dunedin's ultimate conclusion is expressed in words to the effect that Para. 2 made no difference in the operation of the first requirement contained in Para. 1.

So far only one of the meanings that cannot be put upon Para. 2, S. 110 has been attained. For the meaning that paragraph does bear, *Subramania Ayyar* v. *Sellammal*[6] must be referred to, the reasoning in that case having been approved by their Lordships. Sir John Wallis (then Ag. C. J. Madras) referred in that case to the history of the first requirement relating to the value of the subject matter in the Court of first instance. That requirement was first imposed in India by the Privy Council Appeals Act 6 of 1874. He concludes that Para. 2 must not be so read as to render this new provision nugatory. Then he observes (p. 846) :

> It is of course necessary to read the whole section together and to give effect to every part of it ; and when doing so it becomes necessary in my opinion in order to give effect to the new provision in Para. 1 to put a restrictive construction on the general words of Para. 2 which are reproduced from S. 39, Letters Patent, and to read them in their present collocation as applying only to cases which involve some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal and to be taken into account therewith in making up the appealable value . . . . and in any case I think that in the section as it now stands the words 'involve directly' cannot be read as including cases which involve nothing but the actual subject matter in dispute in the appeal. Cases which involve nothing else are in my opinion governed exclusively by Para. 1.

He refers to the difficulty in restricting the words of Para. 2 to "some claim or question other than that involved in the actual subject matter of the suit" — a difficulty occasioned by the retention in Para. 2 of the words 'involve directly', but by way of a solution of the difficulty he adds :

> I think my learned brother in his judgment which I have had the advantage of reading, has shown how effect may be given to the word 'directly' consistently with this construction.

Srinivasa Ayyangar, J. also holds that Para. 2 should not be so read as to render the first requirement of Para. 1 nugatory. He first explains his reasons for reaching the conclusions that the first requirement would be rendered nugatory if mesne profits subsequent to the date of the institution of the suit were added to calculate the value of the subject matter of the suit. Secondly, he comes to the same conclusion — that the first requirement would be rendered equally nugatory if the other contention before him were accepted. That contention he states in these terms on p. 847 : "that whether the subject matter of the suit in the Court of first instance was above Rs. 10,000 or not", an appeal lies to the Privy Council if "the final decree of this Court involves a claim to property of over Rs. 10,000 in value" ; and on p. 849 he explains it more fully:

As to the second point, petitioner contends that, inasmuch as the decree of this Court directs him to surrender possession of the house and pay mesne profits, the decree necessarily involved a claim to property of over the appealable value.

After holding that acceptance of either of the two contentions before him would render the first requirement in para. 1 nugatory, he gives his ultimate decision in these words (p. 849) :

In my judgment Cl. 1 applies to cases where the decree awards a particular sum, or property of a particular value or refuses that relief (i. e.) to cases where the object matter in dispute is of a particular value. In fact the words 'objects in dispute' are used in the provisions relating to appeals from Gurnsey. If the operation of the decision is confined only to the particular object matter, Cl. (2) does not apply, and unless the case satisfies the conditions in Cl. (1) there is no right of appeal. If the decision beyond awarding relief in respect of the particular object matter of the suit affects rights in other properties, Cl. (2) would apply : also if the matter in dispute is one which is incapable of valuation as in the case of easements, Cl. (2) may apply. . . .

Finally he refers to "a few illustrations from the decided cases" to "make the matter plain," viz., to illustrations of cases where the "value of the subject matter of the suit in the Court of first instance," or "the value of the subject-matter in dispute on appeal," could be differentiated from "the value of the property, some claim or question to, or respecting which, is involved directly or indirectly in the decree or final order." He also refers to the difficulty in some cases "to determine under which clause a particular case falls"—but he says,

I do not think that this would in any way affect the decision, as I think that in all cases in which the final decision involves a claim or question to property of a particular value, the decision of the first Court also would merely involve a claim or question in respect of property of the same value.

So that apparently the first requirement would not become nugatory. I need not refer to the decisions in 33 Cal 1286,[10] 45 All 133[11] and 3 Rang 405[12] since the Madras decision has been preferred by the Privy Council. Applying the Madras decision to the present case, it is not contended for the appellant that there is any claim or question to or respecting property directly or indirectly involved in the appeal which is of the required value unless the subject matter of the suit in the Court of first instance with mesne profits up to the date of the suit is of that value. It is not alleged that the case involves some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal. I therefore think that para. 2 may be considered in the words of Lord Dunedin to make no difference in deciding whether the certificate should in the present case be granted for the appeal. I accordingly address myself to the requirements under para. 1 of S. 110 without reference to para. 2. The difficulty in the appellant's way is to satisfy us that the value of the subject matter in the Court of first instance was Rs. 10,000 or upwards. The obstacle is the statement in the plaint that, for the purposes of jurisdiction, the value of the suit is Rs. 9,765-5-6. The respondent claims that this statement precludes the appellant from now contending that the value is greater than he himself stated.

The appellant's first answer is that for the purposes of the appeal to the Privy Council the real value has to be taken into account, and that what is declared in the plaint is not required to be the real value of the suit : but that the law places an artificial value for fiscal purposes on certain claims, and the subject matter of the suit is directed to be valued in the plaint in accordance with that fiscal valuation. He relies for this contention on S. 8, Suits Valuation Act, which provides that in certain cases the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same. This argument however cannot be upheld. S. 8 is no justification for valuing the subject matter of the present suit, for purposes of jurisdiction, on the fiscal basis; for the present suit is for a declaration and for possession. In the first place in so far as the suit is for a declaration, S. 8 has no application, since that section is restricted to suits in which court-fees are payable ad valorem, and the court-fee in a suit for a declaration is not payable ad valorem, (the court-fee for a suit for a declaration being fixed in Sch. 2, para. 17, at Rs. 15). Therefore a suit for declaration is not to be valued under S. 8 on the same basis for purposes of jurisdiction as it has to be valued for the purposes of court-fees. Secondly, in so far as the present suit is for possession, it has no doubt to be valued for fiscal purposes according to the value of the subject matter on the basis of so many times the assessment and the court-fees on a suit for possession are payable ad valorem: but suits for possession are excepted from the operation of S. 8. The exception arises in this way: suits for possession are referred to in the court-fees Act, 7 of 1870, S. 7, para. 5; and S. 8 is applicable to suits other than those referred to in that paragraph, and the other paragraphs specified.

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[11] Gajadhar Mahton v. Ambika Prasad, A I R 1923 All 78=69 I C 645 = 45 All 133 = 20 A L J 903.

[12] Thamsundaseen v. S.M.A.R.R.M. Chetty Firm, A I R 1926 Rang 45=91 I C 647=3 Rang 405.

It follows that in regard to suits (such as the present) seeking a declaration and possession, the value for fiscal purposes is not to be the value for purposes of jurisdiction. Nothing in S. 8 gives the protection of the fiscal value for the purposes of determining the value for jurisdiction of suits claiming a declaration and possession. On the other hand under the Civil Procedure Code, O. 7, R. 1 (i), the value of the suit for purposes of jurisdiction is distinguished from the value for court-fees, and the value for jurisdiction has to be the real value of the subject matter. The Bombay Civil Courts Act 4, of 1869, S. 24, was also cited in this connexion. It refers to the value of the subject matter. I, therefore, reject the appellant's first contention in this respect, viz., that the value for purposes of jurisdiction in respect of a suit seeking a declaration and possession is not required by law to be the real value.

I must proceed to deal with the question whether the suit being one for a declaration and possession, and its value for the purposes of jurisdiction having been declared to be Rs. 9,765-5-6 by the plaintiff,—the value for purposes of jurisdiction being the same as the real value,—he was precluded from contending before us that the real value of the subject matter of the suit in the Court of first instance at the time when the plaint was filed, was more than the value of the suit declared by him for the purposes of jurisdiction. The argument in favour of holding the appellant bound by the value that he declared for the purposes of jurisdiction, is that the plaintiff was estopped from alleging that the real value of the suit was more than that which had been put upon it by himself for the purposes of jurisdiction. This seems to me to put the case too high. It is not true that whenever one of the parties has made a statement that may amount to an admission, he is estopped from proving something different. The statement in the plaint that for the purpose of jurisdiction the value of the suit is of a particular value, may, I will assume, be taken as an admission under Ss. 21, 22 and 23, Evidence Act. But an estoppel under S. 115 is a very different thing. For raising an estoppel, the declaration, act or omission must be made with the intention of causing or permitting another person to believe a thing to be true and act upon such belief. Estoppels must be specifically pleaded and strictly proved. They operate between the person making the declaration and the person believing and acting upon it—and the representatives of those persons. Therefore before an estoppel could have been relied upon, it would in the first place have had to be alleged and proved that the plaintiff intentionally caused the defendant to believe that the subject matter of the suit was Rs. 9,765-5-6 and not more. That position cannot be reached. No estoppel was set up, and if it had been, one sufficient difficulty in the way of the defendant would have been that he knew as much about the value of the property as the plaintiff and that he was never caused to believe the plaintiff's valuation to be true. The case relied upon for this contention is 15 Bom L R 1021,[13] in which it was decided that the amount or value of the subject matter of a suit can in no case exceed the pecuniary jurisdiction of the Court in which it is instituted. But it is expressly said: "Within the limits of that jurisdiction it may greatly exceed the plaintiff's own valuation for court-fees and jurisdiction" and:

> We are ready to assume that the amount or value of the subject matter of the suit, within the meaning and intention of S. 110 is not determined by the valuation for purposes of court-fees and jurisdiction.

In 56 Bom 23[14] the judgment in *Hirjibhai* v. *Jamshedji*[13] is characterized as being obiter in several respects, and it is also stated that 50 Bom 839[15] is inconsistent with it. In the present case in the first instance the plaintiff put the value of the suit at something less than Rs. 5,000 so as to enable the suit to be brought in a Court of lower jurisdiction. The defendant on that occasion contended that the value of the suit was more than Rs. 50,000. He succeeded in the contention that it was at any rate more than Rs. 5,000 : that was all that was necessary. Thus on the one hand the plaintiff put forward the valuation first at less than Rs. 5,000, then at Rs. 9,765-5-6, and now above Rs. 10,000 ; and on the other hand the defendant put the valuation at Rs. 50,000. "The value is a matter of fact": 1 I A 317[4] at p. 320. Their Lordships did not disapprove of Markby, J.'s observation that, in deciding that matter of fact, a mistaken valuation, based on a misunderstanding that the Act authorized the fiscal principle of calculation for other purposes, was not a fraud and could not deprive a party of a right of appeal; and in 1 I A 84[5] their Lordships held that the acts of the parties ought to be given weight to. The act there referred to was that the defendant had adopted the plaintiff's valuation which made the two suits consolidated together over Rs. 10,000 in value. Here the act of the defendant consisted in taking objection to the low valuation of the plaintiff and in getting the suit tried by a Court of higher jurisdiction on the allegation that the subject matter of the suit was worth Rs. 50,000. I do not see how the principle of estoppel applies either to the plaintiff, or to the defendant, or how if it applies to the one it does not apply to the other. There has been no attempt on the part of the plaintiff to disguise the fact that the valuation for purposes of jurisdiction was made by him—he now admits mistakenly—on the fiscal basis. It is unnecessary to order another inquiry after the elaborate inquiry already made in which the lands were valued far above the value necessary for an appeal to the Privy Council. In my opinion paras. 1 and 3 of S. 110, Civil P. C., are satisfied and an appeal lies to His Majesty in Council.

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[13] Hirjibhai v. Jamshedji, (1913) 15 Bom L R 1021=21 I C 783.

[14] Iswarappa v. Dhanji Bhanji, A I R 1932 Bom 111=137 I C 702=56 Bom 23=34 Bom L R 44.

[15] Ambadas Harirao v. Vishnu Govind, A I R 1927 Bom 83=100 I C 109=50 Bom 839=28 Bom L R 1461.

W.D./A.L. *Petition granted.*

✻ A. I. R. 1937 Bombay 334

BARLEE AND DIVATIA, JJ.

Kisandas Laxmandas Gujar and *others* — Defendants — Appellants.

v.

Godavaribai Govinddas Gujar and *others* — Plaintiffs — Respondents.

First Appeal No. 295 of 1931, Decided on 2nd December 1936.

✻ Guardians and Wards Act (1890), Ss. 20, 27 and 39 — Court guardian is not express trustee—Guardian is agent on behalf of ward with liability analogous to that of trustee —At most guardian is constructive trustee— Suit by minors for account against guardian, filed more than three years after attaining majority—Guardian not being express trustee S. 10, Limitation Act, does not apply and suit is therefore time-barred.

Section 27, Guardians and Wards Act, requires a guardian to deal with the minor's property as carefully as if it were his own. In S. 20 a fiduciary relationship is created between the minor and his guardian and under S. 39 he has to perform the duties of his trust. But these provisions do not amount to vesting the property in the guardian as a trustee for a specific purpose. The scheme of the Act shows that a guardian is regarded as an agent acting on behalf of the minor with a liability analogous to that of a trustee. That, however, does not make him an express trustee. In the Trusts Act also the only reference to a guardian is in Illus. (h) to S. 88 which comes under the chapter "Of certain obligations in the nature of trusts." This would mean that the relation between a guardian and minor is fiduciary, and his obligations are based on a constructive as opposed to an express trust : *A I R 1925 Rang 289, Ref.* [P 336 C 1]

Where therefore minors file a suit against the guardian for account, more than three years after attaining majority, the suit is barred by limitation, as S. 10, Limitation Act, is not helpful, the guardian not being an express trustee. [P 336 C 2]

P. B. Gajendragadkar—for Appellants.

S. Y. Abhyankar and *S. Narainaiah*—for Respondents.

Barlee, J.—One Kisandas died leaving a widow, a son Ganpatdas, and some minor daughters. The widow and Ganpatdas died and the estate came to the minor daughters, who are the plaintiffs in this case. In 1900 the District Court appointed two persons, Ganpatdas Hirachand and Laxmandas Narottamdas, to be guardians of the minors' property, and each of them entered into a bond under S. 34 (a), Guardians and Wards Act, making himself liable to the extent of Rs. 6,000 if he failed duly to account for what he might receive in respect of the property of the wards. The plaintiffs came of age in the years 1914 and 1915 and in 1919 Ganpatdas exhibited his accounts, paid what was due from him to the minors and obtained from them a receipt and later got a discharge from the Court. The other guardian Laxmandas did not render an account and the plaintiffs applied to the District Court for an assignment of the bond to enable them to file a suit against him. In the course of those proceedings he died, the bond was assigned on 19th July 1922, and the ladies filed Suit No. 700 of 1923 against the legal representatives of Laxmandas. That suit, they said, was for accounts under the bond, and they prayed for a decree for any balance which might be found due from the legal representatives of Laxmandas deceased on an account being taken. Their suit was dismissed on the ground of limitation. On an appeal being made to the District Court, the District Judge held that it was not time-barred inasmuch as they were entitled to the benefit of S. 10, Limitation Act, since he held that the certificated guardian was an express trustee. Thereafter the suit was decided on its merits by Mr. Limaye, the First Class Subordinate Judge, and he made a decree for Rs. 6,000. After taking accounts he found that a larger sum was due, but having regard to the fact that the plaintiffs were suing as assignees of the bond, he considered that the maximum amount which he could allow them in that suit was Rs. 6,000. Thereafter the ladies filed the present Suit No. 695 of 1930, the cause of action being their right to call on their guardian for an account inasmuch as that right is preserved to them by S. 37, Guardians and Wards Act. The learned Subordinate Judge has given them a decree for Rs. 2,333 and odd, and the legal representatives of the deceased Laxmandas have appealed.

Mr. Gajendragadkar on behalf of the appellants has based his case on two grounds, that this suit is res judicata and that it is barred by limitation. The first ground I shall deal with very shortly. The learned advocate concedes that the plaintiffs had two causes of action, but his contention is that in fact they joined both their causes of action in their last suit. But we do not find that this is correct. As I have said, Mr. Limaye, who decided the last suit, was of opinion that it was based on a single cause of action under the bond, and after reading the pleadings in the plaint in that suit we think that he was right. The plaint is recorded in Ex. 47, which is a copy of the decree in that suit, and para. 4 makes it sufficiently clear that the plaintiffs were asking for accounts under the bond. A more serious argument is that the suit is barred by limitation. It is conceded that it was filed more than three years after the ladies came of age. In fact they did not start any litigation for seven years after they came of age. The learned Judge has considered this point and has decided that the plaintiffs were entitled to the benefit of S. 10, Limitation Act, on the ground that their late guardian Laxmandas was an express trustee within the meaning of that section. The actual wording of the section is :

> Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns . . . shall be barred by any length of time.

We are unable to agree with the learned Subordinate Judge that the guardians were express trustees. A trust, according to the definition in S. 3, Trusts Act, 1882, is an obligation annexed to ownership, and what the plaintiffs had to show was that the effect of the appointment of the guardians was to vest the plaintiffs' property in them as owners. But we have not been able to discover any vesting section in the Guardians and Wards Act. Mr. Abhyankar, who has argued the case on behalf of the plaintiffs, now respondents, has had to admit that there is no such section. The Guardians and Wards Act gives the guardians certain rights and certain duties of management, and certain liabilities, but it does not make them owners. Their position is fiduciary under S. 20, and is analogous to the position of a trustee, but there is nothing in the whole Act to show that a guardian is a trustee. There is no express authority on this particular point, but in 3 Rang 206[1] it was decided that a natural guardian is not a trustee, and at p. 210 I find the following passage :

> Reference may also be made to the definition of a trust in S. 3, Trusts Act II of 1882. "A 'trust' is an obligation annexed to the ownership of property . . . ." From this it is clear that in all trusts the trustee is the legal owner.

As far as we can see, there is no difference between the estates of a private and a certificated trustee, and therefore this decision is an authority for the view which we have taken. Mr. Abhyankar has contended that this question is res judicata. As I have said in the former Suit No. 700 of 1923, the claim of the plaintiffs was dismissed in the trial Court on the ground of limitation, and on appeal the learned District Judge decided that the plaintiffs were entitled to the benefit of S. 10, Limitation Act, on the ground that the guardians were express trustees. That suit was between the same parties, and it appears to us that the Judge who tried that suit, Mr. Mehendale, First Class Subordinate Judge of Satara, was competent to try the subsequent suit. But the parties were not litigating under the same title. In the first suit the present plaintiffs sued as assignees on an assignment by the District Judge, and in the present suit they are suing for themselves. It appears to us, therefore, that the decision in that suit cannot be res judicata in this suit. For these reasons we must hold that the present suit was time-barred, and therefore we must set aside the decree of the lower Court and dismiss the plaintiffs' claim with costs throughout. The cross-objections too are dismissed with costs.

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[1] Ma Thein May v. U Po Kin, A I R 1925 Rang 289=86 I C 297=3 Rang 206.

Divatia, J.—I concur. The point of limitation in this case, though not covered by any express authority, seems to be clear on the sections of the Guardians and Wards Act as well as the Trusts Act. The point shortly stated is whether a Court guardian is a trustee in whom property is vested for a specific purpose and as such comes under S. 10, Limitation Act. The lower Court has held that he does. But in order that he may come under that section, it is clear that some property must vest in him for a specific purpose. There is, however, no vesting section in the Guardians and Wards Act. S. 27 requires a guardian to deal with the minor's property as carefully as if it were his own. In S. 20 a fiduciary relationship is created between the minor and his guardian and under S. 39 he has to perform the duties of his trust. But these provisions do not amount to vesting the property in the guardian as a trustee for a specific purpose. The scheme of the Act shows that a guardian is regarded as an agent acting on behalf of the minor with a liability analogous to that of a trustee. That, however, does not make him an express trustee. In the Trusts Act also the only reference to a guardian is in Ill. (b) to S. 88 which comes under the chapter "Of certain obligations in the nature of trusts." This would mean that the relation between a guardian and minor is fiduciary, and his obligations are based on a constructive as opposed to an express trust. With regard to the respondents' argument that the point of limitation is concluded by res judicata, I think he cannot be allowed to urge it in appeal because it would be inconsistent with his own pleading in the plaint where he has urged that the capacities of the plaintiffs in the two suits are different. I, therefore, agree that the decree of the lower Court should be reversed on the ground that the suit is barred by limitation.

B.D./D.S. *Decree reversed.*

A. I. R. 1937 Bombay 336

BEAUMONT, C. J. AND N. J. WADIA, J.

Motiram Bhikoba Marudkar—Accused—Appellant.

v.

Emperor.

Criminal Appeal No. 524 of 1936, Decided on 11th February 1937, from conviction of Presidency Magistrate, Second Court, Mazagaon.

Criminal P. C. (1898), Ss. 404 and 411—Sentence of whipping passed by Presidency Magistrate—No appeal lies to High Court.

In view of Ss. 404 and 411, Criminal P. C., no appeal lies to the High Court from a sentence of whipping passed by a Presidency Magistrate. [P 336 C 2]

S. G. Patwardhan — for Appellant.

B. G. Rao — for the Crown.

Beaumont, C. J.—This is an appeal by the accused against his conviction by a Presidency Magistrate under Ss. 454 and 380, I. P. C., read with S. 149, and sentenced to five stripes. A preliminary objection is taken that no appeal lies. Under S. 404, Criminal P. C., no appeal lies from any judgment or order of a criminal Court except as provided for by the Code or by any other law for the time being in force. S. 411 provides that :

> Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

The sentence here is to receive five stripes, and it is not a sentence of imprisonment for a term exceeding six months or of fine exceeding two hundred rupees. Therefore from the terms of Ss. 404 and 411 it would appear that no appeal lies.

Mr. Patwardhan on behalf of the appellant relies on the language of S. 3, Whipping Act, which provides that for certain offences the accused may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code. He argues that this sentence was passed in lieu of a sentence which could have been passed under the Code, and he asks us to assume that such sentence would have been an appealable sentence; but obviously we cannot assume that, and hold that a sentence of whipping must be in lieu of an appealable sentence. Reliance is also placed on S. 391 (1) (b), Criminal P. C., which refers to a sentence of whipping being confirmed by the appellate Court, but that section does not in terms confer any right of appeal, and its effect may be limited to sentences passed by Magistrates other than Presidency Magistrates. It seems to me impossible to get over the plain words of S. 411. I think therefore that the preliminary objection must be upheld.

N. J. Wadia, J. — I agree.

K.B./A.L. *Appeal dismissed.*

** A. I. R. 1937 Bombay 337

BROOMFIELD AND WASSOODEW, JJ.

Chanbasappa Rachappa Shettar —
Defendent 1—Appellant.
v.
Madiwalappa Gurushiddappa Shettar
—Plaintiff—Respondent 1.

First Appeal No. 306 of 1931, Decided on 14th December 1936, against decision of Addl. Frst Class Sub-Judge, Dharwar, in Special C. S. No. 153 of 1929.

**** (a) Hindu Law — Adoption—Widow's power to adopt—Adopted son dying without leaving widow but leaving two daughters—Adoptive mother held had power to adopt another son even if estate was not vested in her and deceased son had attained majority.**

As a general rule the power to adopt by a Hindu widow continues during her lifetime provided her husband dies sonless. In case where the husband has left a son, if that son dies without leaving a widow or a son or grandson, the adoption by the mother is valid, although the estate was not vested in her and although the son had attained majority. The existence of heirs nearer than the widowed mother can never be regarded as material in the consideration of the widow's power to adopt : *A I R 1933 P C 155, Rel. on.* [P 338 C 2 ; P 339 C 1]

Where therefore, a son adopted by the widow died without leaving a widow but left two daughters :

Held : that the widow had power to adopt another son and that power was not put an end to by the existence of daughters left by the deceased son. [P 340 C 2]

(b) Hindu Law—Adoption—Widow's power to adopt—Termination.

Where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived: *26 Bom 526* and *A I R 1918 P C 74, Rel. on.* [P 339 C 2]

(c) Hindu Law — Adoption — One of most essential conditions of person's capacity to adopt is that he should be sonless—Existence of daughter or daughter's son competent to perform religious ceremonies necessary for salvation does not remove need of sonless person.

One of the most essential conditions of a person's capacity to adopt is that he should be sonless. The merit lies in having a son either natural or adopted, and a daughter or daughter's son, who might under certain circumstances be competent to perform the religious ceremonies necessary for the salvation of the soul of the deceased, will not satisfy the thirst of 'a person destitute of a son'. [P 339 C 2 ; P 340 C 1, 2]

R. A. Jahagirdar — for Appellant.

S. B. Jathar — for Respondent 1.

Wassoodew, J. — The issue involved in this appeal is as to the validity of the adoption of the appellant Chanbasappa, defendant 1, by a Hindu widow who was defendant 2. The material facts bearing on that issue are these : One Rachappa possessed considerable property some of which was property assigned as remuneration for the officiating watandar in the watan known as the pyati shetti watan of Dharwar. Rachappa at the time of his death in 1900 was the officiating watandar. He left behind him no issue. His widow Irawwa, defendant 2, according to the rules of devolution, succeeded to the watan. In 1904, she adopted one Channappa who did not survive long after the adoption and died in 1905 before his marriage. The successor of the deceased Channappa in respect of the watan property was his collateral Gurushiddappa shown in the genealogy given in the lower Court's judgment. Gurushiddappa gave his son San-Shivappa in adoption to Irawwa in 1906. San-Shivappa assumed office as watandar and was in possession of all the watan estate till his death in February 1928. His wife predeceased him and he left two daughters and no son. On 21st August 1928, the said Irawwa adopted the appellant Chanbasappa for the third time to her husband Rachappa from a family unconnected with his branch or the branch of Gurushiddappa. That adoption has been challenged by Gurushidappa's son, the plaintiff Madivalappa. The factum of adoption was questioned by the plaintiff who also urged that Irawwa's power of adoption was extinguished first on the death of Channappa in 1905 inasmuch as the estate had vested in Gurushiddappa and again upon the death of the second adopted son San-Shivappa inasmuch as he had then attained full age and full legal capacity to continue his line and that the appellant's adoption could not divest the estate which had vested in San-Shivappa's two daughters as his nearest heirs. The plaintiff also contended that San-Shivappa's possession of the watan property was on behalf of the joint family and that the plaintiff was, therefore, entitled to succeed to it. The plaintiff therefore maintained that the appellant Chanbasappa had no right over the property left by San-Shivappa, that his recognition as the watandar of the pyati shetti watan by Government was illegal, that the proper person to hold the watan property according to the rule of succession was the plaintiff, and consequently the possession of the property now in possession of the adoptive mother and the adopted son Chanbasappa should be handed over to him.

The learned trial Judge has held that although San-Shivappa was formally and duly adopted, he could not legally inherit the watan property vested in Gurushiddappa, his father, notwithstanding the latter's consent to the adoption, but that he being in possession of the watan estate since his adoption in 1906 had perfected his right to the property as the adoptive son of Rachappa by adverse possession extinguishing the claims of Gurushiddappa and other members of the latter's family. With regard to the question of the validity of the appellant's adoption, the learned Judge held that although he was duly adopted according to the ceremonies required by law by Irawwa, who had also passed a deed of adoption in his favour, the adoption was not legal and valid inasmuch as Irawwa's power of adoption came to an end in view of the fact that San-Shivappa died leaving two daughters who were entitled to inherit his estate. Accordingly, the plaintiff's prayer for a declaration that the appellant's adoption was unauthorized and illegal was granted, the lower Court also holding that defendant 1 had acquired no right or interest in any of the properties in dispute. It has been conceded in argument that if San-Shivappa at the time of his death had perfected his title to the estate as the adopted son of Rachappa independently of his brother, the plaintiff, and if Rachappa's widow Irawwa could validly adopt the appellant upon the death of San-Shivappa, the plaintiff's claim could not be sustained.

With regard to the question of the nature of San-Shivappa's possession of the property, there is no doubt whatsoever that he was in possession in his own right as the adopted son of Rachappa. The plaintiff himself has admitted the fact that San-Shivappa consistently described himself as the adopted son of Rachappa, subscribed his signatures to official documents in that manner and was recognized by his family members including the plaintiff as the adopted son of Rachappa. His name was entered in the watan register and he officiated as the shetti of the place. The suggestion that probably he represented his brothers in the natural family is unreasonable. All that the plaintiff has succeeded in proving is that he had acted as San-Shivappa's deputy for some time in 1913 and that San-Shivappa had after the adoption preferred to live with Gurushiddappa's family including his brother. The utmost that could be urged upon that circumstance is that perhaps the plaintiff's family derived some benefit from the profits of the watan estate which were received by San-Shivappa; but that would not alter the character of San-Shivappa's possession of the watan property in his capacity as watandar which capacity was derived from his adoption by Irawwa. I think the conclusion of the learned trial Judge that San-Shivappa's possession was adverse since 1906 and was sufficient to extinguish the title of Gurushiddappa and his heirs must be accepted.

The principal argument advanced at the bar was that according to the principles of Hindu law when a son dies leaving female heirs in the direct line in whom the inheritance vests, the mother's power of adoption comes to an end. Now as a general rule the power to adopt by a Hindu widow continues during her lifetime provided her husband dies sonless. In cases where the husband has left a son, if that son dies without leaving a wife or a son or grandson, then his widow can by adopting a son continue the line. The leading authority on the point is 60 I A 242.[1] In that case a Hindu was survived by an infant son and by a widow who was authorized to adopt in the event of the son dying. The son died unmarried at the age of twenty years. Thereupon the widowed mother made an adoption. By a custom of the family, females were excluded from the inheritance and the estate therefore had vested in a distant agnate. The basis upon which the claim was laid in the plaint was, firstly, that when once the estate had vested in an heir of the last male holder other than the adopting widow, the power of adoption was at an end; and, in the second place, that where the husband from whom the power to adopt was derived left a son to succeed him, and that son attained full legal capacity to continue the line, the power of his mother was equally at an end, and that this would be the case whether the family was separate or joint. The first line of reasoning which approached the question from the point of view of rights in property and the second from the ceremonial point of view, were considered by their Lordships of the Judicial Committee, and it was held that as the natural son had left no son to continue the line nor a widow to provide for its continuance by adoption, the adoption by the mother was valid, although the estate was not vested in her and although the son had attained majority. The important considerations which weighed with their Lordships have been thus expressed (p. 248) :

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[1] Amarendra Mansingh v. Sanatan Singh, A I R 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642 (P C).

> In their Lordships' opinion, it is clear that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites. And it may well be that if this duty has been passed on to a new generation, capable itself of the continuance, the father's duty has been performed and the means provided by him for its fulfilment spent, the 'debt' he owed is discharged, and it is upon the new generation that the duty is now cast and the burden of the 'debt' is now laid.

Upon that view the doctrine of devolution of property and divesting of estate was altogether a secondary consideration. The learned trial Judge thought that as the last male holder had left two daughters as his heirs, the right of adoption was exhausted. The discovery or existence of heirs could never be regarded as material in the consideration of the widow's power to adopt, for in the absence of an 'aurasa' or natural born son it is always possible to find heirs to succeed unless there was an escheat to the Crown *propter defectum sanguinis*. In view of the decision in *Amarendra's case*[1] the general proposition stated by the learned Judge below that when a son dies leaving heirs nearer than the widowed mother, the latter's power to adopt comes to an end at his death could no longer be supported. As to when that power comes to an end has been authoritatively settled in 26 Bom 526[2] :

> Where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived.

That rule was approved of in 45 I A 156.[3] The suggestion that the mother's powers came to an end upon the attainment by San-Shivappa of ceremonial competence and full legal capacity is not based upon textual authority or principle. The former point was left open in *Amarendra's case*,[1] but their Lordships held that there was no foundation for the contention that a mother's authority to adopt was extinguished by the mere fact that the son had attained majority or that at the date of adoption the estate had been vested in a third party. The full legal capacity of the son depriving a mother of her right implies the capacity to continue the line either by the birth of a natural son or by the adoption to him of a son by his own widow. The question is whether those conditions existed here : *See Madana Mohana* v. *Purushothama*.[3] There is no good reason to distinguish *Amarendra's case*[1] from the present one on principle. If the purpose of affiliation of a son is founded upon religious and ceremonial doctrine, Irawwa had the legal power to adopt. Some decisions of our Courts create a doubt as regards the capacity of the widow to divest upon adoption an estate except her own. But since the decision in *Amarendra's case*[1] the doctrine of divesting does not come into operation in the consideration of the capacity of the widow to adopt. On general principles therefore, the existence of daughters will be no obstacle to Irawwa's right to adopt. But it has been urged on behalf of the plaintiff, and the argument is interesting on account of its novelty, that just as a son could continue the line so a daughter could provide for the continuance of that line and could through her son minister to the religious requirements of the deceased. One of the most essential con-

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2. Ramkrishna v. Shamrao, (1902) 26 Bom 526=4 Bom L R 315 (F B).
3. Madana Mohana v. Purushothama, A I R 1918 P C 74=46 I C 481=45 I A 156=41 Mad 855 (P C).

ditions of a person's capacity to adopt is that he should be sonless. That basic necessity of adoption has been laid down by writers such as Atri and Manu. "By a man destitute of a son only must a substitute for the same always be adopted." (Dat. Mim, 1, 3 ; Dat. Chand. 1, 3). The expression 'destitute of a son' (*aputra*), implies a person having no male issue. A text of Qankha expresses thus : "One to whom no son has been born or whose son has died, having fasted for a son, etc.": *see* Dat. Mim. 1, 4. The term *aputra* (sonless) has never been understood to imply a person to whom no son or daughter is born. That would mean that the birth of a daughter is sufficient to remove 'the curse of destitution.' The term 'son' in the said verse includes a son's son and grandson. Perhaps the foundation of the argument is the indiscriminate use of the word "grandson" which might imply also a daughter's son. According to the text of Manu, (*see* Dat. Mim. 1. 9).

> A son of any description must be anxiously adopted by one who has none : for the sake of the funeral cake, water and solemn rites ; and for the celebrity of his name. He who has no son may appoint his daughter in this manner to raise up a son for him.

That passage obviously indicates the object of appointment and nowhere suggests that the existence of a daughter or daughter's son removes the need of a sonless person. There is no text to support the view that the reason for the affiliation of a son ceases by the birth of a daughter or a daughter's son. If the existence of a person capable of performing the exequial rites debarred a person from adopting, the whole basic theory of adoption of a son would be destroyed, for someone could always be found among sagotrajas or bandhus to perform the ceremony. No person has been prevented from adopting a son owing to the existence of a daughter to succeed him as heir, nor could a widow be prevented from adopting on similar grounds. There is no suggestion in any text that a daughter is a good substitute for a son. According to Manu's text :

> By a son, a man obtains victory over all people; by a son's son he enjoys immortality and afterwards by the son of a grand-son he reaches the solar abode ; *see* Manu, c. 9, v. 137 ; Dat. Mim. S. I. v. 13.

Obviously the merit lies in having a son either natural or adopted, and a daughter or daughter's son, who might under certain circumstances be competent to perform the religious ceremonies necessary for the salvation of the soul of the deceased will not satisfy the thirst of 'a person destitute of a son.' Therefore it seems to me that the adoption of the appellant by Irawwa cannot be questioned. I hold, therefore, that Irawwa was competent to adopt and the appellant's adoption having taken place with due form and ceremony is valid in law. Accordingly I would allow the appeal, reverse the decree of the lower Court and dismiss the plaintiff's suit with costs throughout.

Broomfield, J.—On the question of adverse possession I have nothing to add to the observations of my learned brother. That question, in my opinion, has little but academic interest seeing that Government have decided to apply the provisions of the Watan Act and consequently the watan property has been held to be assigned for the remuneration of the officiator. San-Shivappa officiated as shetti throughout his life, and must, therefore, be held to have been entitled to property. The reasons given by the learned trial Judge for holding that the adoption of defendant 1 by defendant 2 was invalid are: (1) that defendant 2's power to adopt came to an end on the death of the first adopted son Channappa in 1905, and (2) that San-Shivappa, the second adopted son, left two daughters surviving him. It is difficult to reconcile the finding that defendant 2's power to adopt came to an end on the death of Channappa with the finding twice repeated elsewhere in the judgment that the subsequent adoption of San-Shivappa was legal and valid. The learned Judge attempted to make a distinction between the validity of the adoption of San-Shivappa considered under the general principles of Hindu law on the one hand and considered with reference to the watan properties on the other. But the adoption must be either valid or invalid. There might be a question as to its effect on the transfer of property. That is a secondary and more or less irrelevant matter. The validity of an adoption by a widow according to the law as now expounded by the Privy Council depends on whether the widow's power to adopt has been extinguished or not in the manner explained in *Amarendra's case*.[1] The judgment in this case was delivered before *Amarendra's case*[1] was decided. It is conceded in the argument before us that defendant 2's power to adopt was not extinguished on the death of Channappa and that the adoption of San-Shivappa was valid. The other reason given by the learned trial Judge for holding the adoption of defendant 1 invalid is not quite so easily disposed of because it is not covered by direct authority and because it is supported by certain passages in Sir Dinshaw Mulla's Principles of Hindu Law, 8th Edn., e. g. at p. 530 :

> A widow's power to adopt continues all her lifetime : (1) in all cases where her husband has died without leaving any son; (2) in cases where her husband has left a son, if the son dies leaving her (his mother) as his nearest heir, i. e. if the son dies without leaving his wife, children or any other nearer heir than the widow (his mother) desiring to adopt.

And then agan :

> If the son dies leaving an heir nearer than the widow desiring to adopt, such as a wife, a child, or, he being her step-son, his own mother, the widow's power to adopt comes to an end at his death, and she cannot thereafter exercise it, though she may have been expressly authorized by her husband to adopt in the event of the son's death. The reason is that the estate then vests in an heir of the deceased son and the widow cannot adopt to her husband so as to divest the estate taken by that heir.

But if, as is apparently the case, the learned commentator means to include female children under the term "children" and "child," his view is not in my opinion in accordance with the law as now settled. My learned brother has cited 26 Bom 526,[2] which was approved in 45 I A 156.[3] The law was similarly laid down in 46 Mad 423,[4] where Wallace, J. said (p. 433):

> The purpose of adoption is to perpetuate the line, and if the only son dies without leaving any one to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can by adopting a son to her own husband.

In 60 I A 242,[1] their Lordships said that they found themselves in complete agreement with this proposition. In the same case at p. 256 they summarized their conclusions as follows :

> It being clear upon the decisions above referred to that interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end, but that the mere birth of a son does not do so, and that this is not based upon a question of vesting or divesting of property, their Lordships think that the true reason must be that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son die himself sonless and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive.

The paramount consideration is, therefore, whether the continuance of the line has been provided for. If it has, the widow-mother in a case like this has no power to adopt to her husband. If it has not, she has that power. Now a daughter cannot continue the line of her father, at least in these days when the doctrine of the appointed daughter is obsolete — *see* Sir Dinshaw Mulla's Principles of Hindu Law, 8th Edn., p. 40. The daughter's son has a peculiar and privileged position in the matter of inheritance and in respect of the performance of funeral oblations. But he does not belong to the same family. He is not in the line. When the word "son" is used in the authorities to which I have referred, there can be no doubt, I think, that "son" is intended and not "child." The existence of a granddaughter no more deprives a man's widow of the power to adopt than the existence of a daughter does. I agree therefore that the adoption of defendant 1 was valid, that the plaintiff is not entitled to the declaration granted to him and that his suit should be dismissed in its entirety.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Bombay 341

BROOMFIELD AND TYABJI, JJ.

Ramchandra Vishnu Joshi — Appellant.

v.

Ramabai Govind Gadre and *others* — Respondents.

First Appeal No. 106 of 1935, Decided on 16th April 1936, from decision of Dist. Judge, Poona, in Misc. Appln. No. 11 of 1934.

(a) Will — Construction — Principles of, enunciated.

In all cases involving construction of a will, the primary duty of a Court is to ascertain from the language of the testator what were his intentions. For this purpose the Court must consider the surrounding circumstances, the race and religious opinions, the position of the testator, his family relationship, the probability that he would use words in a particular sense, in short "the Court is entitled to put itself into the testator's armchair". But all this is solely as

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4. Tripuramba v. Venkataraman, A I R 1923 Mad 517=72 I C 278=46 Mad 423=44 M L J 349.

an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto : *37 Mad 199 (P C), Foll.* [P 344 C 1]

(b) Hindu Law—Will—Hindu uncle joint with his nephew executing "Vyavasthapatra" before his death—Deed declaring testator to be separate from nephew from date of execution of deed in symbolical way—Uncle and nephew declared to be owners of their separate shares—Testator sonless and forbidding his wife to make adoption after his death—Disposition in favour of wife and daughters of part of his separate share—No provision for devolution of his separate share after death of widow—Appointment of Vyavasthapaks to manage property—Deed held was will and not family arrangement—Probate could be granted.

A Hindu uncle who was joint with his nephew executed before his death a document called 'Vyavasthapatra' the material clauses of which were as follows : (1) The uncle and the nephew agreed that they were separate from the date of the execution of the document in a symbolical way. All the moveable and immoveable property and business existing on that date was to be divided equally between them. The reasons for the agreement to divide in a symbolical way were stated to be (a) that the property to be divided was such that it would take a long time to make partition by metes and bounds, and (b) that in the mean time the testator's health was becoming worse and he was not confident of his life ; (2) the actual partition in a symbolical way was thus stated: "In this way the partition was made and each has become the owner of his share" ; (3) the testator had no son and he desired that his wife should not make an adoption after his death. Finally the operative clause followed : "for this reason I make the disposition of my property". The testator made a disposition of part of his share in favour of his wife and also daughters. After making this disposition he appointed by his deed some Vyavasthapaks to manage the property. No provision was made for the devolution of his share after the death of his widow. After the death of the testator the nephew managed the property. After many years the brother of the widow who was mentioned as one of the executors applied for probate but the sons of the nephew objected on the ground that the deed was not a will but a deed of family arrangement :

Held : that the document was a will and the applicant was entitled to probate. [P 354 C 1, 2 ; P 355 C 1]

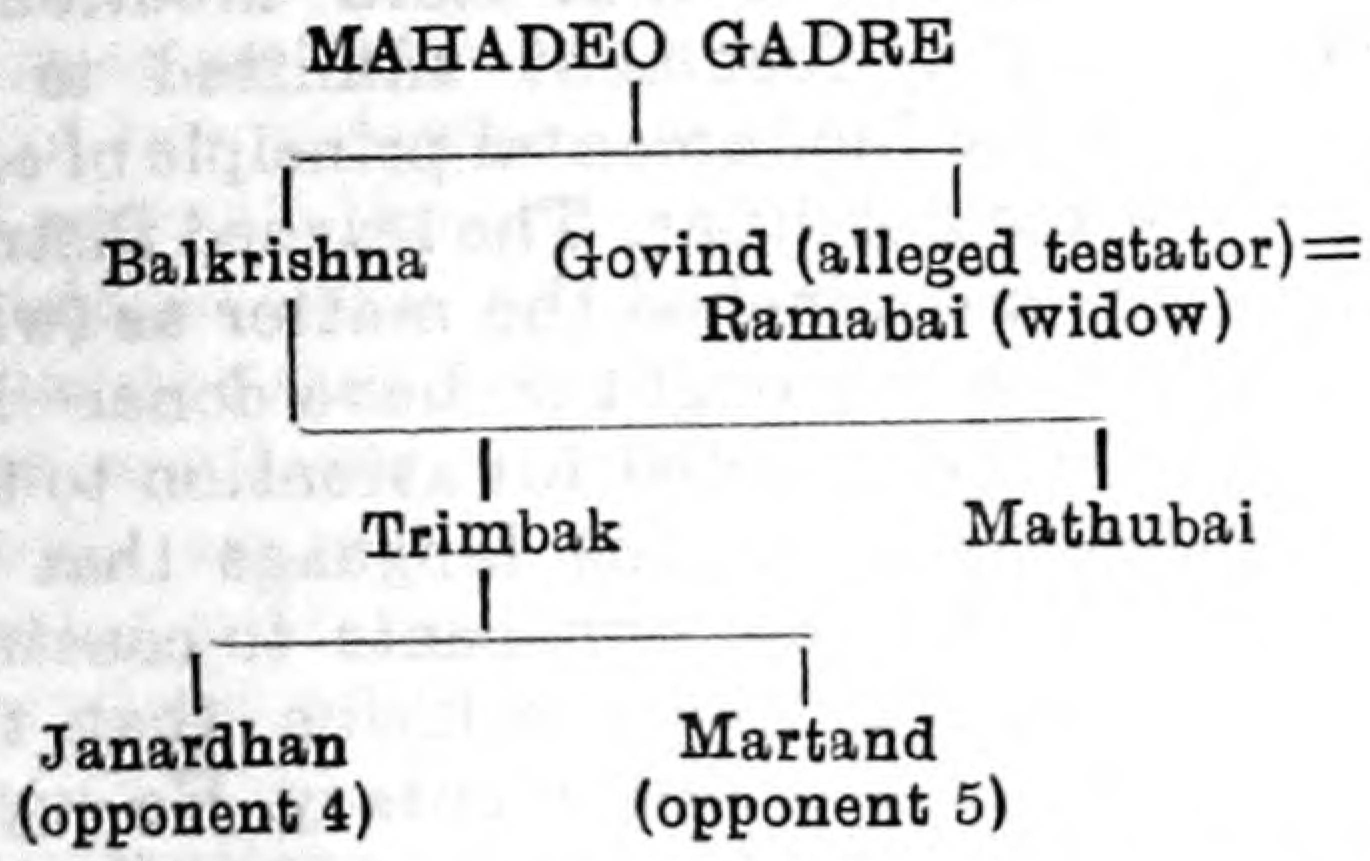
(c) Probate—Value of—Grant of probate does not confer on executor any title to property which testator had no right to dispose of—Probate decides only genuineness of will—It does not decide question of disposing power—In probate proceedings Court cannot go into questions of title nor into question whether deceased's property is joint or separate.

The grant of probate to an executor does not confer upon him any title to property which the testator had no right to dispose of. The Court is not justified in refusing probate because the testator had no power to dispose of some or even all of the property he purported to deal with. Probate is decisive only as to the genuineness of the will and of the right of the executor to represent the estate. It decides no question of the disposing power or the existence of disposable property. It is not the province of the Court in probate proceedings to go into questions of title, and it has long been the settled practice in applications for probate or letters of administration not to enter into the question whether the deceased's property is joint or separate. Probate gives no efficacy to the provisions of the will ; it is merely proof of its contents : *4 Cal 1* ; *18 Bom 749* ; *26 Bom 792* ; *28 Bom 644* and *A I R 1922 P C 212*, *Rel. on.* [P 355 C 1]

H. C. Coyajee and *K. N. Dharap* — for Appellant.

P. B. Gajendragadkar, *P. V. Nijsure*, *M. R. Jayakar*, *G. B. Chitale* and *L. P. Pendse*—for Respondents 1 to 5.

Tyabji, J. — This appeal arises out of a petition dated 9th January 1934 for probate of a will alleged to have been executed by one Govind Mahadeo Gadre on 30th July 1894. The petition was opposed by opponents 4 and 5, the sons of the nephew of the alleged testator, named Martand and Janardhan. Their father was Trimbak, whose father was Balkrishna, the brother of Govind, the alleged testator. I shall refer to opponents 4 and 5 as the opponents. The grounds for opposition to the grant of probate were, first, that no such document as was relied upon by the petitioner had ever been executed by Govind; secondly, that if executed at all, it was executed when Govind was not in a sound disposing mind; thirdly, that, in any case, the original document not having been produced, there was no admissible and sufficient secondary evidence to determine what the terms of the document were; fourthly, that assuming that there was such a document executed in the terms alleged, and that there was sufficient secondary evidence of it, the document was not a document that could be regarded in law to be a will capable of probate. The learned District Judge, before whom the petition was taken, decided all the preliminary points in favour of the petitioner, but he accepted the final contention of the opponents and held that the alleged will was not—in terms of issue 3 before him—"a will in law capable of being admitted to probate". The relation between the parties is shown by the following pedigree :



As there were cross-objections on the points decided against the opponents, the evidence in favour of the view taken by the learned Judge was placed before us by the appellant's counsel. Counsel for the opponents (respondents before us), however, did not contend that the learned Judge was wrong in deciding the first three points against the respondents. In our opinion, on the evidence no other conclusion could have been reached. The respondents however supported the final decision of the learned Judge and argued that probate could not be granted for the reasons that I shall presently state. A distinction was made between the cases of opponents 4 and 5. The former did not appear and did not produce accounts, which presumably would have been against him if produced. The latter appeared and gave false evidence. No distinction need be made between the two for the purposes of the only issue argued before us.

Under the Succession Act 39 of 1925 an application for probate must be made in a form particulars of which are given in S. 276. The main facts that have to be alleged are that the writing annexed to the application is the last will and testament of the testator, that it was duly executed and that the petitioner is the executor named in the will. If the Court is satisfied that the will was duly executed, it may declare that the executor appointed under the will is the representative of the deceased for the purpose of carrying into effect the declaration of the intention of the testator, with respect to his property, after his death. That is the result of the grant of probate, as appears from the definitions of "executor", "probate" and "will" in the Succession Act. S. 273 (corresponding to S. 59, Probate and Administration Act 5 of 1881 and S. 242, Succession Act of 1865) lays down what the effect of probate shall be. It is conclusive as to the executor's title as representative of the deceased against all debtors of the deceased and all persons holding property which belongs to him; it affords full indemnity to all debtors paying their debts or delivering up to the executor property belonging to the deceased.

Accordingly, on applications for probate, the Court will not enter on a question as to the title to the property which the testator by his will purports to leave, nor into the question whether the deceased's property is joint or separate : 28 Bom 644.[1] The probate Court is concerned only with the question stated by me with reference to the Succession Act, Ss. 273 and 276. In the present case, however, it was the opponents who raised the objections to the grant of probate on which the effective discussion before us has exclusively proceeded. The petitioner on the other hand did not either in the first Court, or until a late stage of the arguments before us, protest against these contentions being allowed to be raised by the opponents; nor did the petitioner say that the contentions of the opponents were not such as could be considered on the petition for probate. Moreover, on the basis of those objections taken by the opponents the learned Judge declined to grant probate. It was impossible therefore for us to accept the argument addressed to us at a late stage of the appellant's case, which suggested rather than pressed that we should refuse to hear the respondent in support of the judgment under appeal and decline to examine the grounds for the refusal of probate which had already found acceptance. The issue therefore that remained to be determined—the only issue before us—arose in these circumstances. The petitioner said that the document in question was a will, in every respect conforming with the requirements of the Succession Act, S. 2, Cl. (h). The opponents contend that though on the face of it the document looks like a will—this cannot be denied—yet it cannot, on a proper construction, be treated as a will. The question then to which the learned Judge ought to have addressed himself was, in what respects according to the opponents' contention the document failed to conform with the definition in S. 2 (h); "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. For that purpose the document had to be construed and its language interpreted in accordance with principles which have been frequently laid down. They are stated in extenso in 41 I A 51[2]: "In all cases" (said Lord Moulton)

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[1] Ochawaram Nanabhai v. Dolatram Jamietram, (1904) 28 Bom 644=6 Bom L R 966.

> the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i.e. to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure: 'The Court is entitled to put itself into the testator's armchair'. Among such surrounding circumstances which the Court is bound to consider, none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many case certainly) present to the mind of the testator, influences and aims arising therefrom. But
>
> (says Lord Moulton resuming the thread of his original theme)
>
> all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto.

This last is a point that seems to be overlooked in several parts of the learned District Judge's judgment. Lord Moulton proceeds to answer an apparent objection and then concludes (p. 72):

> That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect is one of the most important of the 'surrounding circumstances' which the Courts must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from.

So that ascertaining the meaning of the language by the proper construction of the words used is throughout insisted upon. I do not overlook that Lord Moulton is speaking of a document admitted to be will. But the fundamental principle of construction cannot differ. The learned District Judge has not clinched the matter as (with all deference) he ought to have done. He ought to have directed his attention to the document itself—to the language that he was invited by the opponents to construe so as to reach the conclusion that the document was non-testamentary. He ought to have asked the opponents to specify the particular "surrounding circumstances" which according to them aided the construction of specified words of the document. He ought to have brought the words of the document in direct juxtaposition with the circumstances, and then given to the words their proper meaning. He ought first to have specified the words or sentences of the document which he was construing. He next ought to have specified the surrounding circumstances by reference to which he was construing those particular words. He thirdly ought to have decided, in the light of the particular circumstances, upon the precise meaning of the words he had specified. That meaning may no doubt be different from what might be attributed to the words at first sight. Finally he ought to have proceeded to consider whether a document having that precise meaning (which he found this document to have) could be deemed to be a will under the Succession Act, S. 2 (h), or whether it failed to conform with the definition in Cl. (h) in any particulars—in the latter event specifying the particulars in which the document so failed.

The process he has followed is much more vague and indefinite. I say so in spite of the fact that the judgment has been rightly admitted even by the learned counsel for the appellant to be careful and fair in a remarkable degree. And yet I believe I am doing no great injustice to the reasoning adopted in the judgment when I state that it amounts to holding that the document meant something different from what appears on the surface, and that therefore, *per saltum*, it is not a will but something else—perhaps a family arrangement.

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[2] Venkata Narasimha Appa Row v. Parthasarathy Appa Row, (1913) 37 Mad 199=23 I C 166=41 I A 51 (P C).

In my opinion several of the considerations relied upon for construing the document failed to satisfy the restrictions laid down by law. Where the terms of the documents are clear, evidence ought not to have been permitted to contradict those terms or to vary their meaning. In the rest of my judgment therefore, though I deal with all the considerations that have been relied upon for the purpose of construing the document so as to make it out to be non-testamentary, I wish to guard myself against being understood as agreeing with the view that all those considerations were properly placed before the Court. I intend to deal with those considerations, because in my opinion even if they had been unobjectionable they would not have led to the conclusions of the learned Judge.

With all deference, the learned Judge did not initially make the exact questions before him sufficiently definite ; he had to consider in what way the document failed to conform to the requirements of a will ; particular words of the document had to be interpreted in such a way as to prevent its being treated as a will for the purposes of probate. This aspect of the matter was therefore specifically put to the learned counsel for the respondent. So far as I can appreciate the contentions of the respondents why this document cannot be treated as a will, they may be put under five heads. I do not suggest that the contentions were put in the exact form of these five heads, but the arguments can all be brought under them : (1) that the document does not contain a unilateral declaration such as a will consists of, but a bilateral transaction, brought about by and representing the terms of an agreement between Govind and his nephew Trimbak, (2) that the document, so far as the dispositions contained in it are concerned, is intended to speak from the time of execution, not from the death of the executant, (3) that it fails to conform to the requirements of a will in that it is not revocable, (4) that for these and other reasons, to which I shall refer, the document cannot support the grant of probate, because probate means forensic recognition of the fact that the executant has appointed his representative for the purpose stated in the Succession Act, S. 273, whereas (it is argued) if the document is properly construed, it must appear that no person is under it entitled to represent the executant in respect of the dispositions mentioned in it—that no person may exercise in the character of a representative of the executant the power of giving effect to those dispositions in accordance with its tenor, and (5) that the document was acted upon and the only dispute is whether it was acted upon as a will or as a family arrangement. The last two heads seem to follow from the first three and do not perhaps require separate statement. The fourth was not put to us in the form I have given it.

Neither these points nor any others to take their place were clearly enunciated by the learned Judge. Enunciating these points is only the first part of the task. The next is to bring the words of the document into contact with the points, and to explain the words of the document so as to give the document the meaning and the effect on which reliance is placed. As to this latter part of the task, I may say at once that the only chance of the respondents was to argue at as great a distance from the language of the document as possible. For, the language of the document gives a complete answer to all their contentions. The respondents' case breaks down at such an early stage of the logical sequence that there seems no justification for formally attempting to go through the last stage.

I shall presently deal with the points taken by the learned Judge, but my general conclusions are that the document is in most respects so clear that no reliance on external circumstances was justifiable; secondly, that the circumstances relied upon cannot induce me to construe it as having a meaning different from what appears on the face of it. Assuming that those circumstances are relevant, they do not lead to the alleged construction. Finally, assuming that the document could be construed in the sense in which the learned Judge thought the circumstances led him to construe it, a document having that sense does not become non-testamentary. The learned Judge referred to the evidence of Mr. Karve, the pleader, Ex. 168, as being the key to the construction of the document. Mr. Karve deposed to having been asked by the alleged testator "what the rights of a person in a joint family were as regards making a will," and to have answered "unless you show your property as divided, you cannot make a will. He (Govind) said 'if they (i. e. the grandsons and nephews) agree to be executors?' I said if they agree to be so in your divided estate, it will be free from objection". In respect of this answer supplying the key to the scheme of the document, the learned Judge and the petitioner are agreed, though the learned Judge uses the key to unlock a different portal. In any case all parties are agreed that Govind was aware of the law that if he remained a member of the joint family he could not make a will; and that he was desirous of making certain testamentary dispositions.

The document purports to be a deed of disposition made on 30th July 1894. It states that it is executed by Govind—not by Govind and Trimbak. Then follow statements in the nature of recitals: (1) that Govind and his elder brother Balkrishna had remained joint till then, (2) that in the beginning of the year 1894, Govind had gone for pilgrimage to Benares where he thought of separating from his brother, and that he wrote a letter to that effect to his brother, (3) that his brother said that the family property should be partitioned by Govind in consultation with Govind's nephew Trimbak, son of Balkrishna, (4) that accordingly on his return to Poona, Govind told Trimbak to partition all the moveable and immoveable properties, (5) Trimbak consented, (6) the two agreed that they are "separate from to-day in a symbolical way". "In this way that whatever immoveable and moveable property, business and dealings exist to-day are to be divided equally—one share belongs to me and the other to Trimbak Balkrishna." Two reasons are given for the agreement to divide in a symbolical way, viz. (a) that the property to be divided was such that it would take a long time to make a partition (meaning evidently a partition by metes and bounds) and (b) that in the meantime Govind's health was becoming worse and he was not confident about his life, (7) then the actual partition in a symbolical way, which has been led up to is thus stated: "In this way the partition is made and each has become the owner of his own share." (8) What follows is not a bare recital: "I have no son and have no intention of taking one in adoption and my desire is that my wife Soubhagyavati Ramabai also should not make an adoption after my death." (9) That Govind told Trimbak to that effect and he (Trimbak) requested that the property should not be actually divided by metes and bounds just then, and that he was willing to act in compliance with the dispositions made by Govind in regard to his (Govind's) property, (10) "on considering this", Govind says "I have full confidence in Trimbak. I am sure that as long as he lives he will manage everything as I would do". (11) Finally the operative part follows: "For this reason we (i. e. I) make the disposition of our (i. e. my) property as shown below". As to his properties, he speaks (a) of a half share in property in Nagar District and Akolner, (b) he refers to the money-lending business, and to lists of what is to be recovered, and of the debts and moveable property of the value of more than Rs. 20,000, and (c) to two houses. He sums up "the joint property of us two brothers is as stated above; and I have got a half share in the same". I have numbered what I call the recitals. They are all important. The 6th, 7th and 11th are crucial. In the eleventh I have used the words 'my property' instead of 'our property'. In the vernacular the first person plural is used in the the sense of the singular. There is no dispute about this. It was expressly admitted by counsel.

A good deal of argument was addressed to us with reference to the effect of the recitals. The interpretation of the document is invited by the opponents in the circumstances that I have already stated, as a ground of defence against the application for probate being granted. The determination of the status of Govind at the time when he executed this document whether he was joint or separate is, according to the opponents, vital for the purposes of construing the document and understanding its meaning. It is in this manner and in spite of the fact that the Court granting probate does not ordinarily determine whether the property is joint or separate, that the status of Govind has to be determined. Lord Moulton in the passage that I have quoted refers to the position of the testator and his family relationships as matters that have to be considered for construing the will. The opponents rely upon the fact that Govind was joint up to the time of the execution of the document, and contend that upon the true construction of these recitals it appears that he continued to be joint till his death and could not have intended to make a will, and that the document must therefore be considered not as a will but as a writing of which probate cannot be granted, perhaps as a family arrangement. An argument pressed upon us was that the recitals of a severance of the estate, since they are alleged to be part of the will, must speak from the death of Govind; that therefore Govind died before there was any severance and that the interest of Govind not being severed he had no power of making a will. This is a perversion of the meaning of the words 'the will speaks from the death of the testator'. That expression is a picturesque form, I presume of the proposition in S. 119, Succession Act, that :

> Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death.

How can this doctrine have any effect on the significance of the events that took place at the time when the will was being written? How can it help to understand the meaning of recitals in the will stating that certain events had taken place at stated times? These recitals are contained in a writing which though it calls itself a deed of disposition executed by Govind alone, is signed both by Govind and Trimbak. There are no reasons to doubt the truth of the statements in the recitals. Everything points to the events recited having taken place as recited. The recitals establish therefore that on 30th July 1894, Govind and Trimbak agreed that they were on that day, i. e. on 30th July 1894, separate in a symbolical way. The sequence of the recitals leading to the concluding statements that the partition is made, that each has become the owner of his own share and that Govind makes a disposition of his property as stated, is so clear that any attempt to give the words any other meaning than the obvious seems desperate. But in view of the arguments before us and the line of reasoning adopted in the judgment under appeal, I will bring the exposition of the law in Lord Westbury's judgment in 11 M I A 75[3] to bear on these recitals (p. 89): "Certain principles or alleged rules of law" (said Lord Westbury)

> have been strongly contended for by the appellant. One of them is that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. Their Lordships do not find that any such doctrine has been established: and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject to which the title is applied. According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to the particular property that it shall thenceforth be the subject of ownership in certain defined shares [and this is what Govind and Trimbak did] then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

Again on p. 91 it is stated:

> There may be a division of right and there may be a division of property; and thus after the execution of this instrument, there was a division of right in the whole property, although in some portions that division of right was not intended to be followed by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

And at p. 93 :

> It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz. that that is sufficient to make a divided family and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject matter.

Then at p. 92 :

> Thus—using the language of the English law merely by way of illustration—the joint tenancy is severed and converted into a tenancy in common.

The words with which the document before Lord Westbury concluded were "We have henceforward no interest in each other's effects and debts except friendship between us" (p. 93). With reference to these words Lord Westbury said (p. 93):

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[3] Appovier v. Rama Subba Aiyan, (1886) 11 M I A 75=2 Sar 218=8 W R 1=1 Suther 657 (P C).

> We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

The learned District Judge has somehow come to construe what I have called the recitals as not effecting a severance of the estate, and apparently as having no effect at all. He holds that there is in the document an indication that the property is not to be partitioned by metes and bounds. Several observations of the learned Judge indicate a notion—contrary to what Lord Westbury laid down—that Govind could not have severed his own interest and converted the joint tenancy into a tenancy-in-common unless he expressly provided that there should be not a mere severance of the joint tenancy but that the resulting tenancy-in-common should be followed by a partition by metes and bounds. The words of the learned Judge are:

> There were . . . . no such circumstances present which induce the members of a joint family to separate and yet this document starts by reciting that a separation had been made that very day.

The absence of circumstances ordinarily inducing separation—I do not (with all respect) imply that I share the opinion that they are absent—would not be sufficient to disregard the plain terms of the document. The learned Judge goes on to observe that Govind was not thinking of himself as a separate member or of his own immediate relatives, but he was thinking of the family as a whole. Reference is then made to the bequests to Mathubai, to the daughters of Balkrishna, the elder brother of the testator, and to Durgabai and to the somewhat peremptory direction that the clerk Nijsure was to be retained in the service of the estate, as leading to this conclusion. The facts that there is no provision for actually dividing the property at any time, and that no steps were taken to carry out the notional partition into actual effect, are referred to as being most significant of all, as though the notional partition were not in the eye of law "an actual effect"—though it severs the joint property and makes joint tenants tenants-in-common. The learned Judge repeats that no steps were taken to carry out the notional partition into actual effect and that the executors were not asked to do so, that the other executor does not do so, and that he does not ask for probate for forty years. Perhaps the most striking passage in the judgment in this connexion is:

> Does this conduct not lead to a clear inference that there was some insuperable objection to the claiming of a partition of Govindrao's share in spite of the recital in this document of his having separated from the family? I think it does. The nature of the objection does not appear because the parties choose to suppress it. Was it a prohibition by Govindrao that notwithstanding the recital in the Vyavasthapatra no partition was to be claimed? We do not know. But in the absence of some such obstacle the conduct of Mr. P. P. Khare, or of the petitioner or of Ramabai appears to be quite inexplicable. It is not enough explanation to say, as Ramabai does, that it was a mistake not to have asked for a partition of Govindrao's share when opponents Nos. 4 and 5 were dividing up the whole property. The opponents want the Court to infer from this conduct that the document is fabricated. That contention is unacceptable because the copies are in the handwriting of Nijsure who was dead long before the two opponents fell out. But that does not make the conduct of the petitioner and of Mr. P. P. Khare at all understandable or natural.

And yet the words in the document are almost to the same effect as the words before Lord Westbury. I have dwelt on the recitals and their effect in detail because their alleged effect is the real basis of the respondents' case. The learned District Judge accepted their argument which was to the effect that the terms of the document show that Govind continued joint, that he desired to continue joint and that the document represents a bilateral arrangement between Govind and Trimbak. The circumstances sought to be relied upon for construing the document do not in my opinion show that the document must be construed in the sense that Govind continued joint, or desired to do so or that the disposition he was making was not the expression of his own will but an arrangement between him and Trimbak. I have enumerated the five points which the respondents undertook to make out. In my opinion none of them can stand the consideration of the recitals which show that Govind effected a severance of his share and proceeded to deal with it as his own property.

The learned Judge's other grounds for his conclusion may be considered in connexion with the terms of the dispositions. The document is according to him somewhat peculiar. He concedes that there are certain dispositions ordinarily contained in wills, such as bequests to relatives. He also refers to the fact that the main object of the document was to make suitable provisions for the widow and to make some minor bequests. But he says that the document also partakes of the nature of a family settlement. In such cases probate may be given of those parts of the document which are testamentary. The whole of the will cannot be rejected because there are some portions which cannot be treated as testamentary dispositions or because the testamentary declaration is embedded in a larger document which may reasonably be classed as a family arrangement. Attention is not directed to the exact difference in the present connexion between the document interpreted as a will and the document interpreted as a family settlement. The dispositions are said not to be reasonably complete as though there were no law that:

> Where an eventuality is unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto : 41 I A 51.[2]

Under this document Govind has dealt with his severed share of the property, but he has not provided for certain eventualities. He has not purported to restrict the widow from asking for a partition by metes and bounds, nor has he provided what was to happen after her death. The law must step in when eventualities arise for which the testator has not provided. That circumstance cannot affect the construction of the document for the purpose of determining whether, so far as it goes, it is a will conforming with the terms of the Succession Act, S. 2 (h) ; and whether there is any person nominated to carry into effect the declaration of the intention of the testator with respect to his property, any person entitled to apply that his appointment to represent the executant of the document should be recognized by grant of probate. The words of the document are too clear to admit of any construction except that Govind is making a disposition of his own property. The learned Judge seems to interpret the document as though it had said : "Our property continues to be joint; we have agreed that out of the joint properties Trimbak will make such and such payments."

It is hardly necessary to refer to 53 I A 123,[4] to which our attention was drawn by the respondents' learned counsel, and to contrast the care with which the document there construed avoids "the one word" (*see* 53 I A 123[4] at p. 130) by which separation could have been brought about. The operative part of the present document runs :

> The disposition of that (viz. the half share that Govind has in the property originally owned by the two brothers jointly) should be made as stated below:—

first for the marriage of the three unmarried daughters, Rs. 5,000 each ; then Rs. 10,000 to the wife Ramabai for her stridhan. Directions are given to her that she should if possible live with Trimbak, and if not that she should stay in the half portion of 'our' residential house. The fourth clause refers to the money-lending business: out of Govind's half share in the vasul (recoveries) fourteen 'gifts' are to be made. To these fourteen gifts three others have to be added which are stated in Cls. 13, 5 and 6, including provisions for Rs. 50 being paid annually out of Govind's half share of the income of the business to his brother-in-law; Rs. 500 a year to his widow Ramabai; Rs. 20 and Rs. 5 per month being given for maintenance to Durgabai Joshi and Autai Joshi. Finally the rest of the income is to be taken by Trimbak Balkrishna—under Cl. 6. So that the whole of the income of the half share in the money-lending business is disposed of. These seventeen legacies are payable only out of the income of the money-lending business; the principal is not to be spent, but Govind's half share in the principal amount must be invested in promissory notes or deposited in some institution (Cl. 10). He clearly purported to deal with his own property and therefore the person that he appointed to give effect to his desires was to act as his representative or his executor after his death. That person is therefore entitled to have his representative character forensically recognized by grant of probate.

Govind has in these gifts provided not only for his own daughters and widow but for the daughters of his brother and of other more remote female relatives. This circumstance has been referred to by the learned Judge as indicating that the property continued to be joint and that the document was a family arrangement; at least that it was non-testamentary. I do not follow the reasoning. An uncle who owns half of a large estate may surely desire to give comparatively small legacies to his nieces. If he has just severed his own share, the desire would not lose its edge. At any rate I do not see how the disposition ceases to be testamentary because the beneficiary is a niece and not a daughter. Govind's ideas with regard to the women of the family were not il-liberal. I instance the very first 'gift' of Rs. 6,000 to his niece Dhondubai, married in a poor family. If he purports to make bequests, must it be supposed that he had no right to dispose of what he was purporting to bequeath, though he had (by a mere declaration such as he has made) the power to make it his separate bequeathable property? Would Govind not say: "Let my half share be severed so that I may deal with it exactly as I like". That is what on the face of it the document purports to do.

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[4] Lakshmi Chand v. Mt. Anandi, A I R 1926 P C 54=95 I C 566=53 I A 123=48 All 313 (P C).

The learned Judge says that the document must be construed so as to give it quite a different effect, viz. that Govind did not take the natural and easy step necessary for exercising powers of disposition according to his own wishes, but that he made an arrangement with Trimbak to give effect to his testamentary desires in a circuitous, unstable manner—after permitting Trimbak to become the sole owner by survivorship. What is more likely to have happened? Would Govind say: "I desire that after my death these payments should be made. I have power and means out of which these payments could be made of my own free will. But I will not use those powers and means. I will place the whole thing in the hands and at the mercy of Trimbak. I will make a family arrangement with him that he should do these things as a matter of grace after my death". I need take only two observations in the judgment under appeal to show how inconsequential they are. In one place it is said:

> The inference therefore that Govindrao never intended to effect a real partition and that this was well known to all concerned seems to be very strong. The intention to separate appears to have been recited only for the purpose of placing a weapon in the hands of the widow if the allowance which he thought necessary for her was not paid to her after his death.

What would be the weapon? According to the learned Judge's view Govind threw away the weapon. The weapon he himself had was to sever his interest and to make dispositions according to his own will. That obvious weapon the learned Judge says that Govind refused to wield; that he only pretended to wield it: that apparently he carefully put the real weapon out of arm's way, and flourished a sham one, deceiving all but the astute into taking the sham one to be real. Again Govind expressly took away all power of adoption from his widow—a threat of which might bring the surviving coparceners of her deceased husband to their senses in case they did not treat her properly. Except the power to adopt, is there any weapon left in the hands of the widow if the joint family continues?

The provision in favour of Mathubai has also, with great deference to the learned Judge, been entirely misunderstood. Mathubai was a daughter of Govind's brother Balkrishna. She had no claim directly against her uncle Govind. Her rights were against her own father and her brother Trimbak. Govind provides for her in Cl. (7) of the will; she is asked to stay with his brother Balkrishna (her own father) as long as he lives; thereafter with her brother Trimbak or with his own widow Ramabai:

> Even if disputes arise they should stay in the same condition bearing in mind the former good name. She should not bring a suit for maintenance. Ramabai should treat her as her own daughter. If in spite of this if they cannot carry on together Ramabai should pay her Rs. 10 monthly out of her own money.

What does this show? Govind asks his widow who is going to be left in a position of comparative affluence, rather to pay Rs. 10 to Mathubai out of her own pocket, than let her bring a suit. Whom could Mathubai sue? Could she sue Ramabai? Govind is anxious that Mathubai should not be driven even to sue her own brother, and that if there was any threat of a suit, Ramabai should step into the breach by giving to Mathubai out of her own purse an allowance of Rs. 10 a month. Govind could easily have provided this Rs. 10 out of the surplus income he left for Trimbak. But he acted with something of the pride of a large landowner and asked his own widow to pay this pittance personally if those primarily responsible for Mathubai's maintenance failed in their duty. This did not prevent opponent 5 from instigating Mathubai to bring a suit against Ramabai on the strength of this clause in the will. The learned Judge has in my opinion given this clause a wrong twist as he has done to several other provisions of the will. Similarly with regard to the Rs. 6,000 given to Dhondubai. The testator gives Rs. 6,000 out of his own divided portion :

> Though this gift has been given to her, my suggestion is that Balkrishna Mahadeo or Trimbak Balkrishna should give her any amount they like from their own share.

These words are not appropriate to an arrangement where reciprocal promises for consideration are made. Yet the provision is referred to as showing that Govind did not think of himself as a separated member of a family. Surely, if what Trimbak would do to members of his own group was so doubtful, Govind would not trust to the sole care of Trimbak his own widow who was admittedly his main concern. Can it be doubted that Govind would prefer commanding to begging? He could place himself in a position to order things of his own right: would he prefer making some family arrangement in which his widow would remain under the obligation of a nephew who could not be trusted to take care of his own sisters ?

The learned Judge has also referred to the fact that Govind has purported to make arrangements as if the whole estate were joint. I agree that Govind in one or two passages seems to forget the change that must follow the severance. He died soon after. He would not after separation any more have been the manager of the whole property. The mere expression of his desires would not, after separation, have the same effect as they no doubt had when he was the manager of the family. He speaks as one accustomed to implicit obedience. The direction that Mathubai should stay with Balkrishna savours of this. His mandate that Nijsure should be continued as a clerk on the same salary, shows the same human tendency to forget that his powers had been altered by the severance and would soon end with his life. Nothing is more significant of this frailty on his part than the faith that his brother-in-law, the present petitioner, a very small pensioner, would be able—on occasion arising—to stand on a footing of equality with the pleader P. P. Khare and his nephew Trimbak — Trimbak the manager of the large inam estates. The petitioner was in fact unable to hold his own against Trimbak as soon as Govind died. All these provisions seem to be based on the vain assumption of one forgetful that the seeming deference with which the petitioner may have been treated during the lifetime of a powerful brother-in-law, was based on circumstances that would come to an end as soon as the brother-in-law died.

I have covered I think most of the considerations referred to by the learned Judge in his judgment. They must be made to bear on the alleged distinctions formulated by me under five heads, between the contents of the document in question and the contents of a will under the Succession Act, S. 2 (h). If this is attempted it becomes still more clear that none of the considerations relied on leads to the establishment of the distinctions. Some of the arguments on behalf of the respondents are however not covered. One main contention of Mr. Jayakar was that the Vyavasthapaks (an expression that is officially rendered as executors, administrators, managers or trustees) appointed under Cl. 11 of the document must be considered not as executors but as persons entering into a bilateral family arrangement with Govind. He argued that Cl. 11 must be taken with the words written by Trimbak at the end of the document: "I agree to the aforesaid disposition and have the full intention of trying to carry it out as far as possible"; that read together they make the document a bilateral document, i. e. in view of these provisions the document must be construed as containing the terms of an agreement between Trimbak and Govind.

How utterly opposed to the terms of the document such a construction is, has I think sufficiently appeared. The document begins by referring to itself as a deed of disposition executed by Govind. The words of Cl. 11 are "for making the aforesaid disposition of my share I have appointed Vyavasthapaks". Is it possible to construe these words as Mr. Jayakar invites us to do?—as not meaning that the authority is conferred on Trimbak by appointment on the part of Govind, but that the document as a whole is an agreement between Trimbak and Govind, and that it was Trimbak who agreed to do certain things and that Govind is the promisee? That is how the document must be construed if it is to be taken as a family arrangement. This argument ignores the mention of the two other Vyavasthapaks.

To apply the argument to them is still more difficult: difficult as it is to apply it to Trimbak. It seems reasonably clear that Trimbak was appointed executor for the reasons stated by Mr. Karve in his evidence. He was appointed executor so that he may not be able to contend that the interest of Govind had not been severed and that Govind had no authority to make a will. In answer to such a contention this document could have been produced—Trimbak having accepted the executorship on the basis that Govind had separated himself and that he had made a will, could neither have feigned ignorance of the separation, nor asserted invalidity. The terms of the will contradict the suggestion that the consent of Trimbak was not as an executor but as a coparcener and as the presumptive sole survivor, promising to carry out the terms of a family arrangement with another coparcener, whose interest is about to come to an end. Part of this argument was the contention that Govind nowhere states that he was treating himself as a separated member. To question that he so states is to ignore the principal terms of the document where Govind's separated interest is repeatedly mentioned.

Then it was argued that the main provisions of the document are in favour of the widow and that they are merely such as the law by itself would make; that the document merely makes the widow's rights under the ordinary law more stringent and more definite. How is this relevant to the construction of the document —and to which parts of the document? This argument makes it common ground that the main object that the testator had in mind was to make the widow independent. This in itself is a sufficient answer to one of the five heads under which I stated the respondents' arguments—the argument that the document was intended to speak from its execution and not the death of Govind. What were the alternative methods available to Govind for making provisions for his widow? If he remained joint she would be entitled to mere maintenance at the mercy of the surviving coparceners. His state of health made it impossible to partition the property by metes and bounds. It took the opponents several years to come to a partition, and still a large portion of a property is left unpartitioned. He could have left his widow with her legal life interest in his separated property. In that case she would hardly have been able to participate in managing her inam lands; she would hardly have been able to act as a partner in the money-lending business. Govind accordingly severed his half-share, but wisely provided that instead of the widow being left in management of her difficult life interest, a fixed sum per year should be made secure for her. So far as one can judge, a liberal balance was left over for Trimbak, as an inducement against raising difficulties in giving to the widow what Govind considered a dignified competence.

Assuming that these provisions are of the same nature as a widow's rights under the ordinary law, but that they make her rights more stringent, more definite and more extensive, that assumption does not give to the document a meaning different from that which it bears on the face of it. Giving the words their exact meaning, the purpose and object of the document admits of no doubt. The testator definitely stated that he had a half-share in the property. Thereupon if he had done nothing else, his widow would have been entitled to a life interest in the property and after the widow the property would have devolved by law upon the daughters of the testator. He thought that considering the nature of the property it would be better and wiser to provide that the other members of the family should, during the lifetime of the widow, give her something which if not the exact equivalent was in the circumstances a sufficient exchange for what she would get as the income of her half-share. He was not concerned then to provide any further with regard to his unmarried daughters. They were by law entitled to be the heirs. He did provide that their heirship should not be liable to be disturbed in the only way in which it might be disturbed, viz. by an adoption on the part of the widow. The prohibition to adopt accords with the whole scheme underlying the will—that nothing should come between the heirship of his daughters who by law were entitled to be the heirs of the property on the death of the widow. It is significant that he says that she may bring up opponent 5 as her son but does not permit her, still less desire her, to adopt him. He adds—this again is not without meaning—that if he likes to stay with her he may do so, otherwise he should go and stay with his own father. Surely this excludes reading into the document any desire on his part that the whole property should be taken by survivorship by Trimbak or his sons. It may be admitted that Govind does not indicate that he expected the opponents to behave in quite the mean and selfish manner that they have adopted towards his widow. On the other hand, there is no justification for the suggestion that he was completely deceived as to their merits and deserts.

Certain events took place after the death of Govind, to which also the learned Judge refers as apparently helping to the interpretation of a document which is clear in itself. I do not see how the conduct of third parties can bring the Court to give to the document a meaning different from that which the words clearly bear. Similar objection has already been made by me to several arguments mentioned before. Subject to it, I shall refer to two or three circumstances on which great reliance was placed. One of them, perhaps the most important, is the fact that the opponents proceeded to partition the property, and according to the learned Judge no steps were taken either by Ramabai or her brother, the petitioner, to take care of the interest of Ramabai while the partition was being made. When the whole of the circumstances are considered, when the available means of enforcing her rights in a Court of law and the expenses of doing so are borne in mind, this conduct hardly needs any explanation. How could this unprotected widow be expected to fight these powerful, and by all indication unscrupulous, nephews of her husband? They have contested every inch of the ground. They did not admit the execution of the document. They did not admit the correctness of the copies, or the availability of secondary evidence. They still vehemently deny its validity. I suggest no doubt on the interest of Govind having been severed. What I do consider doubtful is, whether instead of demanding the rights which had been crystallized for her by her husband into an annual payment sufficient for her purposes, it would have been wise for the widow to demand a partition of the estate, taking upon herself all the trouble of managing it in the teeth of opposition, with all the uncertainties of immoveable property as well as a money-lending business. But I repeat that that decision on her part cannot have the slightest effect on the construction of the document. Then it is said that in certain execution proceedings the names of Balkrishna and Trimbak were put in as being the representatives of Govind on his death. It is seriously suggested that there is some recondite difficulty in determining the meaning of the testator when he says "both of us agreed that we are separate from to-day in a symbolical way," when he says :

> our property, business and dealings are to be divided equally—one share belongs to me and the other to Trimbak. In this way the partition is made and each has become the owner of his own share;

when he says :

> the joint property of us two brothers is as stated above and I have got a half share in the same and the disposition of it should be made as under,

when he refers to his half share in the residential house and his half of the income of the immoveable property, when his half share in the vasul (recoveries) and his half share is contrasted with Balkrishna's half share and when he throughout deals with his half share for the purpose of his disposition, it is suggested that the words "my half share" do not mean his half severed share, the time, mode and reasons for severing which he has recited at length, but that these words mean merely his interest in the coparcenary property—an interest of which, Lord Westbury says, it cannot be predicated that any individual member has a certain definite share or that it is the subject of ownership in any defined shares. For the purpose of so interpreting the document we are invited to derive light from the statements made in execution proceedings by the clerk Nijsure in out of the way places. He says on one occasion that Govind died leaving as his heir and legal representative, his elder brother in the joint family. On another occasion Balkrishna is called the heir of his brother. Then "his heir his own full brother". Such statements are solemnly put forward as overriding the clear words of the document and as establishing that the document does not mean what it says —that there was no separation but that the property continued to be joint. Far from giving any importance to these statements of Nijsure they should not in my opinion have been allowed to be proved. They seem to me to be entirely irrelevant.

The only other matter that I need refer to is the failure to apply for probate for so long. But why should probate have been obtained? Probate is only required for the purposes that I have already stated. It becomes necessary ordinarily for obtaining a decree against a debtor or recovering property belonging to the deceased. When the executor desires to give effect to the will, out of property in his own possession, no probate is necessary. The learned Judge says that Mr. Khare took no steps to prove the will and from this he infers that there must be some insuperable objection to the claiming of partition the nature of which is unknown. Why should Mr. Khare who was willing to give effect to the will incur the expense and trouble of obtaining probate? After Khare's death in 1913, there seems for the first time to have arisen some difficulty in the widow getting her Rs. 2,000. At that time, no doubt, the petitioner might have come forward and attempted to exercise his powers as executor. How difficult it would have been, all the circumstances of the present proceedings indicate. It might have been a ruinous litigation on behalf of Ramabai. She certainly was wisely advised to prefer, as I have already stated, the crystallized interest arranged for by her husband in his separated property, without attempting to antagonise her nephew by asking that the property be divided off, or that her brother should as executor of Govind be placed on a footing of more than equality with his nephew.

In my opinion therefore none of the reasons stated either by the learned Judge or in argument before us lead to the conclusion that the document must be construed in any sense at variance from its plain terms. Its plain terms are to the effect that Govind had separated himself, had turned his interest in the joint estate into a tenancy-in-common so that he might have the power of disposition; that he exercised his power by directing the various dispositions contained in the document; and that he asked the persons mentioned in clause 11 of the document to carry out his directions as his executors with reference to his separated property. Amongst them the petitioner is one, and he is entitled to obtain probate of the will. Two documents were tendered as secondary evidence of the will. One is a copy of portion of the will verified by the signature of Trimbak. This bore serial No. 38 and was originally marked as Ex. D, and then as Ex. 251 (p. 243 of the record). The learned Judge has accepted it as better evidence than the other copy —which was serial No. 37 (on p. 24), later marked by us as Ex. 251-A on p. 143 of the record—though the latter is a copy of the whole will. For the reasons given by the learned Judge we agree with him in this preference. Accordingly when there is any variance between the copies, Ex. 251 and Ex. 251-A, preference will be given to Ex. 251. Ex. 251-A will operate where Ex. 251 is defective. In one respect a variance has been pointed out to us, viz. at the end of clause 6 the words "or his children" appear in Ex. 251 but are omitted from Ex. 251-A. The proper order should have been that under the Succession Act, S. 237, probate be granted of the copies of the will (subject to the preference to which I have just referred) until the original or a properly authenticated copy of it is produced. The application for probate which is under appeal will accordingly be referred back to the District Court. The learned District Judge will take it upon his file and in the light of our judgments will proceed to deal with the petition for probate in accordance with law. The appeal will be allowed with costs throughout on opponents 4 and 5. Costs of opponents 1 to 3 will come out of the estate of Govind. Costs of the receiver's application will be costs in the appeal. No order in Civil Application No. 812 of 1935. Cross-objections dismissed with costs.

Broomfield, J. — The learned District Judge has written a very full and painstaking judgment, and except in the matter of construction of the Vyavasthapatra, I am in complete agreement with him. He is manifestly right in holding that the copies, Exs. 251 and 251-A, are legal and sufficient evidence of the contents of a document which was duly executed by Govind on 30th July 1894. There is no need to discuss the evidence justifying these findings of fact as there is no longer any serious dispute on this point. Learned counsel for opponent 5 very fairly, and wisely I think, has made no attempt to support his client's allegations that Govind was incapable of making and never did make the Vyavasthapatra and that the documents produced in proof of its terms are forgeries. It is now conceded that the Vyavasthapatra is Govind's deed, that its provisions have been carried out for the most part, if not entirely, and that by virtue of its provisions, opponents 4 and 5 are at any rate bound to pay to Ramabai Rs. 2,000 a year.

On the question of construction, I think, the learned Judge is clearly wrong. With great hesitation as he admits he came to the conclusion that Govind did not intend the document to have effect as a will and did not intend to separate himself from the joint family. His finding on the first point is evidently the result of his finding on the second. But the two matters are quite distinct and for the purposes of a probate application the question whether Govind had legally separated himself from the joint family is hardly relevant, however important it might be in a suit for possession of the property. At any rate it is only relevant because, as my learned brother says, the opponents have chosen to make it practically their sole ground of contention in the appeal. The grant of probate to an executor does not confer upon him any title to property which the testator had no right to dispose of : 4 Cal 1.[5] The Court is not justified in refusing probate because the testator had no power to dispose of some or even all of the property he purported to deal with : 18 Bom 749.[6] Probate is decisive only as to the genuineness of the will and of the right of the executor to represent the estate. It decides no question of the disposing power or the existence of disposable property : 26 Bom 792.[7] It is not the province of the Court in probate proceedings to go into questions of title and it has long been the settled practice of this High Court in applications for probate or letters of administration not to enter into the question whether the deceased's property is joint or separate : 28 Bom 644.[1] Probate gives no efficacy to the provisions of the will ; it is merely proof of its contents : 49 I A 37.[8]

'Will' is defined in S. 2, Succession Act, as meaning the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. I think it is not possible to read the provisions of this Vyavasthapatra, the terms of which have been given in substance by my learned brother and are set out in greater detail in the District Judge's judgment, without coming to the conclusion that it is a will. Vyavasthapatra, deed of settlement, is no doubt a neutral term. But it may perfectly well be applied to a will as was done for instance in 12 Mad 490.[9] Govind died very soon after the execution of the deed and it was obviously written in contemplation of death. The expression "meanwhile my health has become worse and I am not confident about my life" is almost a stock phrase in wills. Many of the provisions of the deed, for instance, those as to payments to be made to Govind's widow and as to her residence with his nephew Trimbak and acting under the latter's advice and so on, obviously relate to the period after his death and could not be conceived of as taking effect in his lifetime. I think this is generally speaking true of the deed as a whole. Then also three persons are appointed Vyavasthapaks to carry out the dispositions. This word may or may not have been used as the technial equivalent of executor, but it is clear at any rate that these persons were only intended to function after Gobind's death, and they are appointed to carry out all the provisions of the deed. I think the *animus testandi* is obviously present. It is quite true, as the learned District Judge says, that Gobind has made no provision for and apparently did not contemplate or desire the partition of the family estates by metes and bounds. Nor has he provided for the devolution of his separate share on the death of his widow. But he was a lawyer of long experience ; he cannot be supposed to have been in ignorance of the legal effect of his declaration of his intention to separate his interest in the estate.

> I and Trimbak have both of us agreed that we are separate from to-day in a symbolical way. It is in this way : that whatever moveable and immoveable property, business and dealings exist to-day are to be divided equally, one share belongs to me and the other to Trimbak. In this way the partition is made and each has become the owner of his share.

The language could hardly have been clearer. Then it is provided that Ramabai was to have half the income but was not to require accounts if she were paid Rupees 1,500 a year and if necessary she was to have half the residential house in Poona for her residence. Out of recoveries made in the money-lending business, debts were to be paid and from the balance Ramabai was to get Rs. 500 out of Gobind's share. This money was to be invested and Ramabai was to have the income. The legacies provided for in the deed were all to come out of Govind's half share. I can see no justification for the District Judge's view that there was "some insuperable objection to the claiming of a partition of Gobind's share" in spite of the recital in the document as to his having separated from the family from the date of the deed. Although Govind may not have desired actual partition, there is no substantial reason to believe that he prohibited it. It is at least doubtful if the prohibition would have had any legal effect if he had. The District Judge has attached far too much importance to the conduct of members of the family and their advisers after Govind's death, a very unsafe criterion of the intentions of Govind himself. As is now admitted, the express provisions in the Vyavasthapatra were carried out or mainly carried out, and because opponents 4 and 5 chose to ignore what was merely implicit in the deed and divided the property among themselves, and Ramabai and the petitioner, her brother, raised no objections to this, it cannot be assumed, contrary to the clear language of the deed itself, that Govind did not intend to separate his interest in the estate and to dispose of it after his death so far as he thought it necessary to do so. It is to be noted that Ramabai herself has obtained either by voluntary payment or under decree of Court the share of the income to which she was entitled under the Vyavasthapatra. It is argued that she could have claimed partition of Govind's share of the immoveable property. Assuming that she could, it is extremely doubtful if she would have been well advised to do so. It is not at all difficult to understand her resting content with what she had, an assured provision for her life, rather than face protracted and possibly uncertain litigation in pursuit of more. The daughters are the only persons whose interests could be said to have been vitally affected by opponents' dealing with the estate, which was all done subject to Ramabai's rights. The daughters may perhaps not have known the provisions of the will. Even if they did, they have no right to Govind's estate during the lifetime of the widow, and subject to possible defences which do not concern us in this proceeding, they can presumably recover their share in it after her death in spite of the fact that the opponents have chosen to include it in their own shares. It must be borne in mind that when the opponents separated between themselves, sufficient property was kept joint to pay Ramabai her share of the income.

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[5] Behary Lall Sandyal v. Juggo Mohun Gossain, (1879) 4 Cal 1=2 C L R 422.

[6] Barot Parshotam Kalu v. Bai Muli, (1893) 18 Bom 749.

[7] Bal Gangadhar Tilak v. Sakwarbai, (1902) 26 Bom 792=4 Bom L R 637.

[8] Khaw Sin Tek v. Chuah Hooi Gnoh Neoh, A I R 1922 P C 212=102 I C 832=49 I A 37 (P C).

[9] Lakshmi v. Subramanya, (1889) 12 Mad 490.

Mr. Jayakar who has argued the case on behalf of opponent 5 has supported the District Judge's view that the Vyavasthapatra should be regarded as a family arrangement and not as a will. He says the deed shows a desire to preserve the property in the family while making defined and enforceable provision for the rights of the widow and daughters which they have under Hindu law, but which under Hindu law are undefined and precarious. The reference to notional partition by agreement was for the purpose of validating the gifts to relations which otherwise would have been invalid. The family was to be kept intact and not disrupted. The learned counsel relied on Govind's prohibition of adoption by his widow, his direction to Ramabai to treat the opponent, Janardan, as a son and to stay with Trimbak and to be guided by his advice and on the direction to Mathubai to stay with Ramabai and similar directions to other relations. Stress is also laid on the fact that Trimbak himself was made a Vyavasthapak and on the fact that he endorsed the deed signifying his agreement and his intention of trying to carry it out as far as possible. This construction of the deed is a little different from that of the learned District Judge. Mr. Jayakar does not adopt the extreme view that Govind did not intend to separate his interest at all. He conceded apparently that there was by agreement a notional separation of his interest. But the argument was that this was merely for the purpose of validating the specific bequests or gifts and had no effect otherwise. I am not satisfied that this was Govind's intention.

The features in the deed on which Mr. Jayakar relies may all be explained, I think, by Govind's desire that all the members of the family should continue to live together in amity as long as possible in spite of the legal separation. But, in any case, if there was by declaration or agreement a legal separation of Govind's interest, the legal consequences must

follow, whatever his intention may have been. He might have disposed of the whole of his estate in any way he liked. He chose to dispose of the income and not the corpus ; but that he continued to be a coparcener in respect of the corpus and that the corpus devolves according to the law of the coparcenary is a proposition which I am quite unable to accept. Besides, on this view there was at any rate a separation of interest which validated the specific dispositions made in the deed. Therefore to that extent, at any rate, the deed is a legal declaration of the intention of a testator with respect to his property which he desired to be carried into effect after his death, that is to say, it is a will within the definition. There is one other small point. The learned advocate for opponent 4 raised an objection that the deed required registration. This point was not taken in the trial Court nor by learned counsel for opponent 5. I think there is no substance in it. We find that the Vyavasthapatra is a will and as such admittedly it did not require registration. The suggestion is that in so far as it effected a severance of Govind's interest the deed required to be registered. But the answer is that the severance was not effected by the deed. It merely recited a severance which had taken place already. I agree with the order proposed by my learned brother.

S.C./D.S. *Appeal allowed.*

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* A. I. R. 1937 Bombay 357

BEAUMONT, C. J. AND N. J. WADIA, J.

Gurunath Shankar Godkhindi
Accused — Applicant.
v.
Emperor.

Criminal Revn. Appln. No. 406 of 1936, Decided on 23rd February 1937, from order of Honorary Magistrate, First Class, Belgaum Cantonment.

*** Railways Act (1890), S. 120 — Scope — S. 120 does not apply to acts done by railway servant acting as such — Assistant Station Master on duty abusing passenger cannot be convicted under S. 120.**

Section 120, Railways Act, is not intended to include any act done by a railway servant acting as such. The offences specified in S. 120, if committed by railway servants, can well be dealt with by departmental action. If therefore an Assistant Station Master while on duty abuses a passenger, he cannot be convicted under S. 120: *A I R 1929 Sind 249, Rel. on*; *A I R 1919 Mad 971* and *A I R 1934 Pat 52, Dissent.* [P 357 C 2; P 358 C 1]

B. D. Belvi — for Applicant.

P. B. Shingne — for the Crown.

Beaumont, C. J. — In this case the accused was an Assistant Station Master at Khanapur on 28th August 1936, and on that day he is said to have abused one Mr. Joshi, a pleader of Belguam, and he is being charged with an offence under S. 120, Railways Act. He took a preliminary objection that S. 120 did not apply to acts done by a railway official when acting in his official capacity. The learned Magistrate overruled that preliminary objection, and his decision was upheld by the Sessions Judge of Belgaum in appeal. The accused now applies to this Court in revision. Ss. 99 to 105 (inclusive) of the Railways Act deal expressly with offences by railway servants. The group of sections is headed "Offences by Railway Servants." S. 106 starts a new group of sections under the heading "Other Offences," and S. 120 falls within that group. It is contended by the applicant that the sections falling under the head "Other Offences" deal with offences by passengers or other persons using a railway company's property, but not with offences committed by railway servants acting as such. On the other hand, the view which prevailed in the lower Courts is that S. 120 is expressed in sufficiently wide language to cover acts done by a railway servant. The section so far as material is in these terms :

> If a person in any railway carriage or upon any part of railway : (a) is in a state of intoxication, or (b) commits any nuisance or act of indecency, or uses obscene or abusive language, or (c) wilfully and without lawful excuse interferes with the comfort of any passenger or extinguishes any lamp, he shall be punished with fine which may extend to fifty rupees, in addition to the forfeiture of any fare which he may have paid and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant.

The whole of the last paragraph suggests that the section was not intended to cover an act done by a railway servant in the course of his official duties. It can hardly be supposed that the Legislature intended that if a Station Master uses abusive language to some porter, who has committed some fault, the Station Master can be removed from the railway by another porter. It would be opposed to the maintenance of good discipline for a senior railway official to be removed from the railway by a junior official. It is to be noticed also that some of the sections constituting offences by railway servants cover the same grounds as sections dealing with "Other Offences". For instance, S. 100 makes drunkenness by a railway servant an offence which may be punished with imprisonment up to one year, and S. 120(a), as I have pointed out, deals with intoxication, which is only made punishable by a fine which may extend to fifty rupees; and S. 101 deals with offences by a railway servant endangering public safety, whilst S. 129 deals with an act by any person endangering public safety, the former section involving a heavier penalty. In my opinion taking the sections of the Act as a whole, there can be no doubt that S. 120 is not intended to include any act done by a railway servant acting as such. The offences specified in S. 120, if committed by railway servants, can well be dealt with by departmental action. That view has been taken by the Court of the Judicial Commissioner in Sind in A I R 1929 Sind 249.[1] On the other hand, the opposite view has been taken by the High Court of Madras and the High Court of Patna; the first case being 19 Cr L J 313[2] and the second case being A I R 1934 Pat 52.[3] I prefer the Sind view. That being so, we must allow this application, and direct the learned Magistrate to allow the preliminary objection and hold that no offence is disclosed under S. 120, Railways Act.

N. J. Wadia, J.—I agree.

P.R./A.L. *Application allowed.*

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1. Mulchand v. Emperor, A I R 1929 Sind 249= 1929 Cr C 542=118 I C 197=30 Cr L J 879 =23 S L R 409.
2. Cuffly v. Muhammad Ali Muhammad Ibrahim Sahib, A I R 1919 Mad 971=44 I C 329 =19 Cr L J 313.
3. Appal Swamy v. Emperor, A I R 1934 Pat 52 =1934 Cr C 70=146 I C 937=35 Cr L J 205 =14 P L T 652.

*** A. I. R. 1937 Bombay 358**

BROOMFIELD AND WASSOODEW, JJ.

Purshottamdas Harjivandas Patel and *others* — Appellants.

v.

Rukmini and *others*—Respondents.

First Appeal No. 167 of 1931, Decided on 2nd December 1936.

* **(a) Hindu Law—Maintenance—Post-nuptial agreement of separation between husband and wife — Agreement providing for maintenance of wife out of definite and fixed fund and containing express stipulation against claim for further maintenance out of any other property—Agreement is valid and binding and is bar against wife's claim for increased amount of maintenance.**

The right of maintenance essentially rests on personal obligation and the maintenance is usually fixed on the need of the woman and the ability of the income of the husband and his property to meet them. If the rate is fixed upon those considerations either by an agreement or by a decree and there is no stipulation against increase, it stands to reason that the Court would reconsider the position in the light of changed circumstances. But where a post-nuptial agreement of separation between husband and wife provides for maintenance of the wife out of a definite and fixed fund and contains an express stipulation against claim for further maintenance out of any other property of the husband, it is difficult for a Court to set aside that agreement. The agreement is a bar against wife's claim for increased amount. The agreement is neither opposed to public policy nor to the spirit of Hindu law. Such an agreement is entirely different from an ante-nuptial agreement to live separately after marriage. The latter cannot be defended under the rules of Hindu law or morality. Normally therefore the Court would give effect to an agreement providing for separation and maintenance unless it were proved to have been obtained by any of the circumstances invalidating a contract such as fraud, undue influence or mistake : *A I R 1934 Lah 167* and *9 Bom 99, Disting.*; *2 Bom 624, Expl.*; *A I R 1924 Mad 687, Rel. on.* [P 360 C 2; P 361 C 2; P 362 C 1]

* **(b) Hindu Law—Maintenance—Widow—Widow entitled to same degree of comfort and reasonable luxury as she had in husband's house—But this is not an absolute rule—Amount of maintenance depends also on past relations of wife with her husband—Differences between husband and wife and wife failing to perform her duties as wife—She is not entitled to the same kind of treatment as other affectionate co-widows.**

No doubt the maintenance of a widow should be such an amount as would enable the widow to live consistently with her position as a widow with the same degree of comfort and reasonable luxury as she had in her husband's house unless there are circumstances which affected one way or the other her mode of living there. But that is not an absolute rule for the guidance of Courts in all cases where maintenance is claimed. There are other circumstances upon which the amount of maintenance depends, viz. the past relations of the wife with her husband. These cannot be ignored. Where there had been differences between the husband and the wife and the wife had failed to perform her duties as a wife, prima facie she cannot be treated on the same level as the other co-widows for whom the husband had an affectionate regard : *A I R 1929 P C 128, Expl.* [P 362 C 2]

G. N. Thakor and *R. J. Thakor* — for Appellants.

M. B. Dave and *P. A. Dhruva* — for Respondent No. 1.

H. D. Thakor — for Respondents Nos. 2 and 3 (New trustees).

Wassoodew, J.—This appeal arises out of a suit by the plaintiff, a Hindu widow, against the executors and trustees of her husband for maintenance at a sum higher than that recoverable from a fund set apart by her deceased husband in a post-nuptial agreement of separation dated 22nd June 1907, and confirmed in the husband's will dated 19th October 1919, for separate residence, for arrears of maintenance in the amount of Rs. 150 and for a declaration of a charge for maintenance on the properties of the husband. The grounds upon which the higher rate was claimed were that the income available was insufficient to meet her needs and that the estate of her husband could afford paying more on the same scale as the co-widows.

The defence was that the terms of the agreement and the will debarred the plaintiff from making the claim, that there was no justification for claiming an enhanced rate of maintenance, that the suit was not maintainable in the absence of proper and necessary parties such as the residuary and other legatees, and that the plaintiff being a party to a decree in an administration suit against the executors by the residuary legatees in which she did not contest the terms of the will, cannot sustain this claim in derogation of the terms of the will. In disallowing those contentions the learned trial Judge found that having regard to the value of the property and the income therefrom, the plaintiff should be allowed a total maintenance of Rs. 1,000 a year payable in the first instance out of the fund earmarked for the purpose by her husband in the agreement, and if that fell short of the sum allowed, the balance should be paid out of the other properties in the hands of the trustees. A charge was created on certain properties and the arrears of maintenance claimed which the trustees were willing to pay were allowed with interest at six per cent. Against that decree one of the trustees and executors has filed this appeal. The material facts are these: Owing to disagreement and unsuitability of temper the plaintiff and her husband separated by mutual consent in 1907. At that time they entered into an agreement whereby the plaintiff consented to live separately, and her husband in his turn agreed to provide for her maintenance and residence by setting apart the annual income from one share in the New Cotton Mills at Ahmedabad. The relevant terms of that agreement are as follows:

> So we both of us jointly and through the intervention of Seth Amratlal Damodardas have come to the arrangements mentioned below. That as long as you live you should for your maintenance and clothing receive directly from the Mill in your full right the dividend that may be paid every six months on one share of my ownership of the certificate of Rs. 1,000 of the Ahmedabad New Cotton Mills bearing No. 403. Neither I nor my heirs and executors will cause any obstruction or hindrance therein. . .As also neither I nor my heirs and executors will so long as you live deal with the said share by way of sale, pledge, gift or in any other manner. The interest received for the said share for both the halves is Rs. 80. If hereafter from time to time whether the amount increases or decreases, you have the right to take the said amount. . . .Neither I nor my heirs and executors will come in the way of your receiving the dividend on the abovesaid share No. 403 directly from the Mill in your own independent right. . . .And you stay at a distance of a hundred paces from the house in which I reside. We have executed this document in your favour on that understanding. . . .And you have no right to get maintenance and clothings in any manner other than the dividend on share No. 403 mentioned above. . . .The rent of the house is included in the dividend on the share No. 403 mentioned above.

The husband has made his heirs and representatives liable as well as himself for the fulfilment of his engagement and it is clear from the words used that the agreement was to operate during the lifetime of his wife. In effect it provides for the maintenance out of a definite and fixed fund and contains an express stipulation against a claim for further maintenance out of any other property of the husband. It is common ground that the value of the share appreciated and the annual dividend rose gradually from Rs. 80 to Rs. 1,000 and more in some years. During the two years before the suit the average annual dividend was between Rs. 300 and Rs. 375. In 1916, during the lifetime of the husband, who after the separation from the plaintiff had married two more wives, from the last of whom he had two daughters, the plaintiff unsuccessfully sued him to secure a higher rate of maintenance. In December 1919 the husband died leaving a will dated October of that year. In that will the following instructions were left for the executors in regard to the plaintiff's maintenance (*vide* Ex. 20):

> My first wife Rukmini has gone away from my house after committing a theft. She is very mischievous. I am not at all on good terms with her. She has given and gives me great trouble. She having beaten my second wife Shakri, she was also fined in a criminal Court. A deed has

> been executed on 22nd June 1907, in connexion with her maintenance and in the above deed a 'tharav' has been made to the effect that she should be given the dividend of the share No. 403 of the Ahmedabad New Cotton Mills Company which is standing in my name. The said share should be transferred in the name of Seth Amratlal Gordhandas after my death and dividend should be continued to be paid to her as is done at present. I do not keep any right of hers on that share or on any other property of mine and I do not give her anything and my executors in order to satisfy the confidence that I have put in them should not give her any more property nor should spend any of my properties through her. She should not be allowed to interfere with the management and expenses of the properties and should not do anything by which she directly or indirectly can interfere. I clearly order that the said Rukmini my wife should not adopt anybody and I make a clear objection to adoption. Although a clear 'tharav' was made for her maintenance she had filed a false suit which has also been dismissed.

After the husband's death the executors named in the will assumed management of the property. In 1925, Suit No. 1361 was filed on behalf of the two daughters for administration of the property against the executors. The plaintiff was made a party to the suit and she did not question the dispositions under the will, nor did she claim a higher rate of maintenance in those proceedings. Under the decree which was passed in that suit on 27th March 1928, the executors were directed to make certain payments to the residuary legatees upon the ascertainment of the residue. Till March 1930, the plaintiff, notwithstanding the gradual reduction in the annual dividends, did not ask for more maintenance; but on 11th March 1930 she gave notice to the executors of her claim which was denied by defendant 2, one of the executors. She then instituted this suit on 16th April 1930. The learned trial Judge thought that the husband was not entitled to limit the widow's maintenance by a will, for she was "in a subordinate sense a co-owner with him in the property and her right to maintenance was in a limited way a charge on his property". It may be pointed out that that reasoning of the learned trial Judge is wrong and contrary to authority. It cannot be suggested that a Hindu wife has any property or co-ownership in her husband's estate. West, J. in 5 Bom 99[1] has observed as follows:

> A Hindu wife has no property or co-ownership in her husband's estate in the ordinary sense which involves independent and co-equal powers of disposition and exclusive enjoyment. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and, unless such right has been defined by partition or otherwise, it cannot be released by her to her husband.

The learned trial Judge did not base his conclusion on that ground alone for he regarded the agreement as not binding on the plaintiff. In his opinion the change of circumstances could not be ruled out of consideration in giving effect to the agreement and it was for the Court to consider whether the restrictions imposed by the husband were reasonable and whether they should be given effect to in view of the general rule of law that the amount of maintenance is liable to variation with the change of circumstances of the family and the value of the estate. It is now well recognized that by marriage a Hindu widow acquires a right to be maintained according to the estate and condition of her husband of which right she cannot be divested except by her own misconduct. In this case the husband and wife had lived separately by mutual consent and the husband has laid aside a part of his estate out of which the wife agreed to receive maintenance. Except when the wife sued her husband for an enhanced rate of maintenance in 1916, the wife had accepted the arrangement and had lived upon the income for nearly 11 years after the husband's death. The question therefore arises whether the wife can, notwithstanding the agreement, sue the husband's executors for increasing the monthly rate of maintenance out of the income of other properties in their hands on the ground stated above. It is said that the standard of her comfort should be measured by that of her co-widows in accordance with the provisions made by the husband in his will. Upon examination of the terms of the agreement, I do not think it can be said on principle that that agreement is either opposed to public policy or the spirit of the Hindu law. Such an agreement is entirely different from an anti-nuptial agreement to live separately after marriage. The latter cannot be defended under the rules of Hindu law or morality. Normally therefore the Court would give effect to an agreement providing for separation and maintenance unless it were proved to have been obtained by any of the circumstances invalidating a contract, such as fraud, undue influence or mistake. No such circumstance has been alleged, and it appears from the record that both parties entered into it out of their own free will.

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[1] Narbadabai v. Mahadeo Narayan, (1880) 5 Bom 99.

The learned counsel for the plaintiff-respondent has argued that in no circumstances can a Hindu wife enter into a valid agreement agreeing to relinquish her right to claim enhanced maintenance in future out of her husband's property either in his own or in the hands of his heirs or executors; and he has attempted to support that proposition by certain observations of West, J. in 5 Bom 99.[1] In that case the husband shortly before his death had quarrelled with his wife and they entered into an agreement by which he allotted to her the free use of a room in his house for her residence and separate allowance for maintenance at the rate of Rs. 7 a month. Subsequent thereto the husband made a gift of his entire property in favour of his sons. After the death of the husband the wife sued the sons for arrears of past maintenance and for making provision for her future maintenance out of the property in their hands which was the subject of the gift. The Court held that the Hindu husband could not alienate by a deed of gift to his sons the whole of his immoveable property, though self-acquired, without making for his wife who is destitute and has not forfeited her right to maintenance, a suitable provision to take effect after his death and that after the husband's death she was entitled to follow such property to recover her maintenance, her right to which was not affected by any agreement made by her with her husband in his lifetime. That case, in my opinion, is distinguishable on facts. No estate of the husband was set apart to meet the charges of maintenance of the wife either during the husband's lifetime or after his death and the entire property was disposed of by gift. The Court held that there could be no consideration for the release of a wife to maintenance when there was a mere promise to pay Rs. 7 a month by the husband. The gift to the sons followed promptly on the release, and was obviously intended to shut out any future claim of the wife. It cannot be regarded as an exercise in good faith of the husband's general authority and discretion but was distinctly an endeavour to place the wife, should she survive her husband, in a state of destitution. There is nothing in that judgment which is consistent with the view that under no circumstances can the husband satisfy the wife's claim to maintenance by agreeing to set aside a fund sufficient to meet the requirements of the wife in every respect. One of the main grounds on which West, J. decided in favour of the wife was that the latter had not taken any property of the husband which would deprive her of the right to maintenance which she would otherwise have.

The essential difference lies in the fact that in this case a fund has been earmarked for the purpose of meeting the charges of maintenance of the wife. But it has been urged that as maintenance fixed by a decree is liable to be increased or decreased whenever there is a change of circumstances, the rate fixed by mutual agreement between the husband and the wife could not be invariable. We were referred to 2 Bom 624[2] in support of that view. In that case there was no decree debarring the parties from claiming any increase, and in my view if there was such a provision in the decree, the claim for an enhanced rate could not be sustained. The right essentially rests on personal obligation and the maintenance is usually fixed on the needs of the woman and the ability of the income of the husband and his property to meet them. If the rate is fixed upon those considerations either by an agreement or by a decree and there is no stipulation against increase, it stands to reason that the Court would reconsider the position in the light of changed circumstances. But where, as here, there was an express agreement renouncing the claim to maintenance out of any property of the husband other than that specified in the agreement, it is difficult for a Court to set aside that agreement.

It has been suggested that the cause of action for a wife to sue her husband for maintenance is entirely distinct from the cause of action of the widow for maintenance on the death of her husband and consequently the agreement by a wife will not operate to extinguish her right to claim maintenance from her husband's estate in the hands of the executors. The learned counsel for the plaintiff has relied on the observations in 15 Lah 591.[3] That was not a case of agreement between the

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2. Sidlingapa v. Sidava, (1878) 2 Bom 624 (F B).

3. Mt. Sham Devi v. Mohan Lal, A I R 1934 Lah 167=152 I C 606=15 Lah 591=36 P L R 333.

husband and wife such as we have here. The only question that arose in that case was whether in view of a prior decree against the husband for maintenance the widow was barred from exercising her claim for maintenance against her husband's heirs. There is nothing in the report of the case to suggest that the prior decree for maintenance debarred the wife from claiming her right against the heirs. Here the wife has agreed with the husband to receive maintenance from a fund assigned to her by the husband, and the question of her right to claim additional maintenance out of another fund in the hands of her husband's heirs must ultimately be decided by the terms of that agreement. Those terms in this case are clear and admit of no implication. It cannot be said that the husband was contracting out of his legal liability to maintain his wife and the agreement is not susceptible of the interpretation that she was releasing a right to future maintenance which she perhaps could not do, if the release operated as a transfer of that right, in view of the prohibition in S. 6, T. P. Act. All that she purported to do or did was to renounce her right to claim maintenance out of any fund other than the one which she agreed should be set apart to discharge the husband's liability. On principle the present case cannot be distinguished from 47 Mad 308.[4] There a Hindu widow contracted with her husband's coparceners to receive a fixed maintenance per annum and not to claim any increase in future even in case of change of circumstances. The Court held that the agreement was valid and binding upon the widow on the ground that it was tantamount to a release of the widow's right to increased maintenance in future. Although that was not the case of an agreement between the husband and the wife, the correctnes of the principle upon which the agreement with the husband's heirs was upheld cannot be doubted. Therefore in my opinion the agreement must operate as a bar toe th plaintiff's claim in this suit.

The above finding is decisive of the plaintiff's claim to enhanced maintenance. But apart from it, on the merits, we do not think that the plaintiff has made out a case for increasing her maintenance. In 56 I A 182 [5] their Lordships of the Judicial Committee remarked that the maintenance should be such an amount as would enable the widow to live consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house, unless there are circumstances which affected, one way or the other, her mode of living there. But that is not an absolute rule for the guidance of Courts in all cases where maintenance is claimed. There are other circumstances upon which the amount of maintenance depends, viz. the past relations of the wife with her husband. These cannot be ignored. There is an indication in the will of the husband that the plaintiff had failed to perform her duties as a wife. The differences between the husband and the wife are also narrated in the agreement. Prima facie therefore she could not be treated on the same level as the other co-widows for whom the husband had an affectionate regard. It is true that in some years there were windfalls, but the average income between 1923 and 1930 was practically the same and satisfied the plaintiff's normal requirements. Even when the income was less, as apparently it was when the agreement was entered into, she was content to carry on within that income. It is also true that the total income out of the husband's estate had progressively increased, but latterly there has been a set-back. Assuming that it was such as could support the plaintiff's case, that was no ground without satisfactory proof that her needs had substantially increased for allowing her claim. The learned Judge below therefore seems to me to have erred in acceding to her prayer for treating her on the same footing as the other co-widows.

There are two other contentions urged in this appeal. The first is that the suit was untenable on the ground of non-joinder of parties. It seems to us that so long as all the executors who are trustees were parties to the suit, the estate of the husband was sufficiently represented. The other ground is that the plaintiff, not having contested in the administration suit the terms of the will, has forfeited her claim inasmuch as she cannot approbate and reprobate. That contention, in

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4. Mohieswara Rao v. Ayya Devara Durgamba, A I R 1924 Mad 687=78 I C 831=47 Mad 308=46 M L J 189.

5. Ekradeshwari Bahuasin v. Homeshwar Singh, A I R 1929 P C 128=116 I C 409=8 Pat 840 =56 I A 182 (P C).

our opinion, is not well founded. No suggestion has been made that by her conduct she has received any material addition to her income or that in 1925 she ought to have raised the same contention as she does in the present suit. It is possible to suppose that there was no reason then for her to claim enhanced maintenance. As regards the arrears of maintenance, the executors have conceded the plaintiff's claim and there is no dispute about it in this appeal. Therefore the directions in the lower Court's decree that the defendants should pay Rs. 150 with six per cent. interest on it from the date of suit and that the defendants should continue to make payments out of the dividends of the New Cotton Mills shares earmarked for the plaintiff's maintenance will stand. In other respects the plaintiff's claim fails. Therefore we allow this appeal and reverse that part of the decree only in so far as it allows the plaintiff's maintenance at a sum higher than the income of the assigned fund out of the other estate of the deceased Madhavlal Nathubhai and creates a charge on his properties for that maintenance. The direction in the lower Court's decree in regard to the payment of dividends and arrears thereof is maintained. In the circumstances we direct that the plaintiffs should bear their own costs throughout both in the trial Court and in the appeal Court and the costs of the defendants throughout shall come out of the estate.

Broomfield, J.—The most important point in the appeal is whether the plaintiff's claim to increased maintenance is barred by the agreement between her and her husband in 1907 by which certain dividends were assigned for her maintenance and she relinquished her right to get maintenance out of any other property. I agree with my learned brother that this agreement must be held binding on the plaintiff. She was capable of contracting; she was about thirty years old at the time. There is no suggestion of undue influence or anything of that kind. 47 Mad 308 [4] is an authority for the view that an agreement between a widow and the coparceners of her husband not to claim increased maintenance in case of change of circumstances is valid and binding. I do not think there is any foundation for Mr. Dave's contention that a similar agreement between the husband and wife is not equally binding. Of course the distinction between the husband's personal obligation to maintain his wife and the widow's claim to maintenance out of her husband's estate does exist. In that connection I may mention 31 Mad 338 [6] in addition to the cases cited in the argument. The release of the husband's personal obligation by the wife, even if legal, would not of course be any bar to her claim as a widow against the husband's estate, but the agreement with which we are concerned cannot be regarded as a release of the husband's personal obligation only. It is an agreement to accept the portion of the property of the husband as provision for the wife's maintenance and contains an undertaking not to ask for maintenance out of any other property. I do not see anything illegal in that nor do I find anything in 5 Bom 99,[1] the case on which Mr. Dave has principally relied, which is inconsistent with the validity of such an agreement.

My learned brother has pointed out what was decided in 5 Bom 99.[1] A Hindu cannot dispose of his entire property by gift or will so as to defeat the right of his widow to maintenance. A Hindu widow cannot release her right to future maintenance unless it has been defined by partition or otherwise. The facts in that case are entirely different. The husband promised a monthly payment of Rs. 7 during his own lifetime (as it appears) and in consideration of this promise only—which as West, J. said was no consideration at all—the wife relinquished her claims on her husband's estate, which was afterwards disposed of without any provision being made for her maintenance. Under those circumstances it was held that the persons who took the estate were legally bound to pay the maintenance promised by the husband. West, J. emphasized the fact that the wife had taken no part of the husband's property. There is no similarity between that case and the present. Here, part of the husband's estate, which by agreement was accepted as adequate for the purpose, was assigned for the maintenance of the wife during her lifetime. There was no relinquishment of right to future maintenance nor has the plaintiff's right to maintenance out of the assigned fund ever been questioned. The husband's will confirmed the

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6. Surampalli Bangaramma v. Surampalli Brambaze, (1908) 31 Mad 338=18 M L J 254.

provision. All that the plaintiff relinquished was her right to claim maintenance out of the other property of the husband in case of changed circumstances; and as the permanent assignment of the dividends to her was good consideration for that relinquishment, I see no reason why she should not be bound by it. I agree with the order passed by my learned brother.

S.C./D.S. *Appeal allowed.*

A. I. R. 1937 Bombay 364

BROOMFIELD AND N. J. WADIA, JJ.

Haridas Vallabhdas — Accused — Petitioner.

v.

Bombay Municipality — Opposite Party.

Criminal Revn. Appln. No. 47 of 1937, Decided on 30th March 1937, against order of Presidency Magistrate, 3rd Court, Bombay.

(a) Bombay Prevention of Adulteration Act (5 of 1925), Ss. 14 and 16—Accused's right to insist upon public analyst being summoned and examined as witness can be exercised even before accused leads evidence in his defence challenging correctness of public analyst's certificate.

There is nothing in the language of Ss. 14 and 16, Bombay Prevention of Adulteration Act, to suggest that the ordinary rule with regard to the burden of proof in a criminal trial is to be departed from. S. 14 does not deal with the procedure to be followed in a trial under the Act; it merely lays down a rule of evidence and allows a presumption to be drawn. S. 16 nowhere says that the accused's right to insist upon the public analyst being summoned and examined as a witness is to be exercised only after the accused has led evidence in his own defence challenging the correctness of the public analyst's certificate. The language of the section on the contrary shows clearly that it is open to the accused at the commencement of the trial, as soon as he is accused of the offence, to require the Court to summon the public analyst as a witness. [P 364 C 2; P 365 C 1]

(b) Bombay Prevention of Adulteration Act (5 of 1925), S. 14 (1) — Presumption under S. 14 (1) applies even to certificate of public analyst produced by accused.

Section 14 (1), Bombay Prevention of Adulteration Act, applies to any certificate of a public analyst and not only to a certificate on which the prosecution is based. There is no necessary connexion between Ss. 14 and 16 of the Act. The rebuttable presumption under S. 14 (1) will equally apply to a certificate of a public analyst produced by the accused himself. [P 365 C 2]

C. K. Daphtary — for Petitioner.

S. D. Vimadalal — for Opposite Party.

P. B. Shingne — for the Crown.

N. J. Wadia, J.—This is an application in revision against an order made by the Presidency Magistrate, 3rd Court, Bombay. The applicant is a dealer in ghee. On 13th July 1936, an Inspector of the Bombay Municipality visited his shop and purchased from him two samples of ghee bearing a certain trade-mark. On 6th August 1936, the Assistant Health Officer of the Municipality filed an information before the Honorary Presidency Magistrate alleging that the petitioner had committed an offence under S. 4, Bombay Prevention of Adulteration Act (Bom. 5 of 1925) by having sold or caused to be sold or offered for sale a certain article of food under the description of ghee, which was not in fact ghee as it contained over thirty-eight per cent. of foreign ingredients.

The petitioner had applied that the public analyst, whose certificate was to be put in, should be called as a witness as the petitioner wanted to test the accuracy of the certificate given by him before he entered upon his defence. The application was opposed on behalf of the Municipality, and the learned Magistrate disallowed it holding that the public analyst could be called under S. 16, but not until the contrary was proved under S. 14 of the Act. He apparently took the view that S. 16 does not begin to operate until the contrary has been proved within the meaning of S. 14. S. 14 of the Act provides that the production in any proceedings under the Act of a certificate of a public analyst in the form specified in Sch. A shall, until the contrary is proved, be sufficient evidence of the facts therein stated. S. 16 provides that when any person is accused of an offence under the Act, he may require the Court to summon as a witness the public analyst who analysed the article or sample of food in respect of which he is accused of an offence and the Court may, and shall in every case in which the accused deposits in the Court such sum of money in accordance with the scale prescribed as would be sufficient to meet the expenses of the attendance of the analyst before the Court, summon the analyst. There is, in our opinion, nothing in the language of Ss. 14 and 16 to suggest that the ordinary rule with regard to the burden of proof in a criminal trial is to be departed from. S. 14 does not deal with the procedure to be followed in a trial under the Act: it merely lays down a rule of evidence and allows a presumption to be drawn. The certificate of a public analyst is to be accepted as correct without further proof until the contrary is proved.

There is nothing in the language of this section or of S. 16 to support the view which the learned Magistrate apparently took that before the accused can ask the Court to summon the public analyst, he must prove by other evidence that the certificate of the public analyst is not correct. If there had been no provision in the Act corresponding to S. 14, it would have been necessary for the prosecution in each case to prove the certificate of the public analyst by examining the public analyst as a prosecution witness. All that S. 14 does is to relieve the prosecution of the obligation to examine the public analyst in cases in which the correctness of the certificate is not challenged, and to enable the Court to accept the certificate without further proof of the facts stated in it. But the section expressly states that the certificate can only be accepted as sufficient evidence of the facts stated in it until the contrary is proved, and it is open to the accused to prove the contrary in any one of several ways. He can do it in the manner provided in S. 14 (2) by asking the Court to cause a sample of the article to be sent for analysis to the Chemical Analyser to Government. He can also challenge the correctness of the certificate by producing a certificate of analysis by a private analyst. But it is obvious that the easiest and probably the best method of challenging the correctness of the public analyst's certificate might, in many cases, be by cross-examining the public analyst and showing that the method of analysis adopted by him was wrong. S. 16 nowhere says that the accused's right to insist upon the public analyst being summoned and examined as a witness is to be exercised only after the accused has led evidence in his own defence challenging the correctness of the public analyst's certificate. The language of the section on the contrary appears to us to show clearly that it is open to the accused at the commencement of the trial, as soon as he is accused of the offence, to require the Court to summon the public analyst as a witness, and the section provides that if the accused deposits the requisite amount in Court, he is entitled as of right to have the public analyst called as a witness. In our opinion the view taken by the learned Magistrate was clearly wrong. The Rule will be made absolute and the order made by the learned Magistrate set aside.

Broomfield, J.—I agree and have only to add this: that S. 14 (1) of the Act applies to any certificate of a public analyst and not only to a certificate on which the prosecution is based. There is no necessary connexion between it and S. 16. The rebuttable presumption under S. 14 (1) will equally apply to a certificate of a public analyst produced by the accused himself. That seems to be a further indication that the provision merely lays down a rule of evidence and has nothing to do with the order of proceedings at the trial.

T.M./D.S. *Rule made absolute.*

A. I. R. 1937 Bombay 365

B. J. WADIA, J.

In re *Janki Prasad Poddar* —
Assignee of the decree.
Baijnath Ramchander — Plaintiff.
v.
Binjraj Joowarmal Batia & Co. —
Defendants.

Application in O. C. Suit No. 2576 of 1919, Decided on 22nd September 1936.

(a) Civil P. C. (1908), O. 21, R. 16 — Notice under Rule is imperative and its absence makes proceedings void—Application merely to be brought on record without asking for execution is not one in accordance with law.

Notice under O. 21, R. 16, Civil P. C., is imperative. It is an indispensable condition of jurisdiction under the Rule, and failure to give it renders the proceedings in execution void as against the transferor and the judgment-debtor. It is in the first place necessary for the transferee to apply for execution to the Court which passed the decree. An application merely to be brought on record without asking for the execution of the decree is not an application in accordance with the law, as it is not an application for execution of the decree. [P 367 C 2]

(b) Civil P. C. (1908), S. 39 and O. 21, R. 11 (2) — Transfer of decree for execution is not mode of execution—Application under S. 39 is only step-in-aid of execution.

Transmission of a decree to another Court for execution is not a mode of execution. Such transmission is only a ministerial act. An application under S. 39, Civil P. C., for transfer of a decree is not an application for execution. It is only an application for a step-in-aid of execution. [P 368 C 1, 2]

(c) Civil P. C. (1908), O. 21, Rr. 11 (2) and 16 – Procedure under R. 16 explained—Notice under R. 16 must be issued by Court which passed decree and not by Court to which decree is sent for execution.

The procedure to be followed in making an application under O. 21, R. 16, Civil P. C., falls under two heads. The transferee must first apply for execution of the decree to the Court which passed it, and pray that the usual notice do issue. After the objections have been heard and the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the application was made by a decree-holder. The transferee must then apply for execution of the decree under O. 21, R. 11, specifying the mode or modes in which the assistance of the Court is required. If the decree is to be transmitted, the application under R. 11 must be made to the executing Court. The notice required by R. 16 must be issued by the Court which passed the decree. Such a notice cannot be issued by the Court to which the decree is sent for execution. It is only when the notice is made absolute that the transferee acquires a right to apply for execution under O. 21, R. 11, sub-r. (2). If the notice is discharged, any application under O. 21, R. 11, sub-r. (2), becomes unnecessary : *36 Bom 58, Ref.* [P 368 C 2 : P 369 C 1]

(d) **Civil P. C. (1908), O. 21, R. 17—Application for execution within time but application for amendment beyond limitation — Application for amendment should not be rejected but must be considered on merits—Discretion of Court must be exercised with regard to all circumstances of case—If amendment is allowed, it relates back to date of application for execution.**

If the application for execution is within time, but the application for amendment is made after the twelve years have expired, the application for amendment should not be straightway rejected, but must be considered on its merits. The matter being within the discretion of the Court, it would depend upon the nature of the amendment whether it should or should not be allowed after the time limit for execution of the decree had expired. What O. 21, R. 17 (1) requires is a substantial compliance with the requirements of O. 21, Rr. 11 to 14. The discretion of the Court must be exercised with regard to all the circumstances of the case ; the ordinary rule of procedure is that an amendment should be allowed only if it could be allowed without prejudice to the rights of the other parties existing at the time of the application for amendment. No amendment, for instance, will be allowed if there has been an undue delay in the application, or if the defect sought to be remedied is so material as to amount to a defect not merely in form but in substance. If the amendment is allowed, it relates back to the date of the application for execution, but application for execution must be within time : *6 I A 233 (P C), Rel. on.* [P 370 C 1]

(e) **Decree — Execution — Decree against firm—Decree-holder or his transferee may apply for execution against any one or more partners.**

It is open to the decree-holder or the transferee of a decree against a firm to apply for execution against any one or more of the partners of the defendant firm, as the firm is only a collective name of the individuals who are the members of the partnership. [P 370 C 2]

N. H. Bhagvati — for Assignee of the decree.

J. H. Vakeel — for Defendants.

Judgment.—This is a notice under O. 21, R. 16, Civil P. C., taken out by the assignee or transferee of a consent decree dated 16th December 1921, calling upon the plaintiff in the suit and one Chandmal Binjraj, a partner of the defendant firm, to show cause why the decree should not be executed by the transferee under the provisions of that Rule. The decree was for a sum of Rs. 55,312-10-0 with further interest, payable by certain instalments. Various applications were made by the original decree-holder for execution, and he received in all a sum of Rs. 40,475-2-0 in part satisfaction of the decree by diverse payments which have been noted on the decree. It appears that a certified copy of the decree and the necessary certificates were transmitted to Calcutta in July, 1923, for further execution, but as nothing more was realized, the attachment levied in Calcutta was withdrawn. No further satisfaction was obtained by execution of the decree or otherwise, within the jurisdiction of this Court, and a sum of Rupees 15,337-8-0 for debt and further simple interest thereon at the rate of six per cent. per annum from 16th December 1921, till payment, still remained due and payable to the original decree-holder.

By an indenture dated 28th May 1934, the plaintiff assigned all his right, title and interest in the decree to the assignee for a sum of Rs. 4,000, and the assignee thereupon took out this notice under O. 21, R. 16 on 2nd October 1934. The notice came up for argument before Blackwell, J. on 27th February 1935. A clerk in the service of the defendant firm put in an affidavit stating that the defendants did not admit the assignment, that without prejudice to that contention the application for execution was not in accordance with law, and that in any event execution of the decree was barred by limitation. It appears that the learned Judge asked what the specific points arising on the notice were, and thereupon a set of what were called "issues" was handed in to the Court. They fall under four heads, viz. (1) whether the assignment was validly executed ; (2) whether the application for execution was in compliance with the requirements of the Civil Procedure Code ; (3) whether the assignee was bound to apply for execution against the defendant firm or whether he could also apply for execution against only one of the partners of the firm, and (4) whether the application was within the meaning of Art. 183, Lim. Act. The assignment was executed by a constituted attorney of the original plaintiff on behalf of the plaintiff under a power of attorney executed by the plaintiff on 22nd November 1933, in favour of two persons jointly and severally. The power of attorney was typed in the office of the plaintiff's attorneys, Messrs. Patell & Ezekiel. At the end of first clause, there is an insertion in ink authorizing the constituted attorney also

> to sell the claim under the decree to some other party at such price as my attorneys shall deem fit, and for that purpose to execute the assignment of the decree in favour of such purchaser.

The insertion in ink has been initialled by the plaintiff, the donor of the power. The defendants did not admit at first that the clause inserted in ink existed in the power of attorney at the time of its execution. Two clerks from the office of Messrs. Patell & Ezekiel were called, one of whom deposed to the insertion of the clause in ink in his own handwriting at the instance of his masters, and the other deposed to the execution of the power in the office of the Sub-Registrar. On hearing this evidence, counsel appearing for the defendants said that he did not wish to press the point any further. The application for execution was declared by the transferee at Calcutta on 12th September 1934. It was filed in Bombay on 20th September 1934. Counsel for the defendants drew the attention of the Court to column (J) in the application for execution which is headed: "The mode in which the assistance of the Court is required." In that column the transferee of the consent decree prays that he may be granted leave under O. 21, R. 16, Civil P. C., to execute the consent decree in place and stead of the original decree-holder, and that notices may be issued under the same Order and Rule to (1) Baijnath Ramchander, the transferor, and (2) Chandmal Binjraj, one of the partners in the judgment-debtors' firm. It was contended that the application under the circumstances was one merely to recognize Jankiprasad Poddar as the transferee of the decree, and that it was not in accordance with the requirements of O. 21, Rr. 16 and 11, which should be read together. It is clear that a transferee must apply for execution of the decree, and he cannot apply merely to the Court for recognizing him as a transferee. The question is whether his application for execution is in accordance with the law. The person appearing on the face of the decree as the decree-holder is entitled to execution unless it is shown by some other person under O. 21, R. 16 that he has taken the place of the decree-holder. It is provided inter alia by O. 21, R. 16 that where a decree is transferred by assignment in writing, the transferee may apply for execution of the decree to the Court which passed it. After that it goes on to say that :

> The decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Where the decree has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections, if any, to its execution. The notice is imperative. It is an indispensable condition of jurisdiction under the Rule, and failure to give it renders the proceedings in execution void as against the transferor and the judgment-debtor. On the hearing of the objections, if any, the notice is either made absolute or discharged. If it is made absolute the transfer is recognized as valid, and the transferee is entitled to execute the decree as if he was the decree-holder. In other words, after the notice is made absolute he acquires the status of a decree-holder, and he can then apply for execution as a decree-holder. Under S. 233 of the old Code of 1882 it was left to the discretion of the Court to allow or refuse an application made by the transferee, but under O. 21, R. 16, the transferee's right to apply for execution does not depend on the discretion of the Court.

It is in the first place necessary for the transferee to apply for execution to the Court which passed the decree. An application merely to be brought on record without asking for the execution of the decree is not an application in accordance with the law as it is not an application for execution of the decree. It was argued by counsel for the transferee that an application by the assignee for leave to execute the decree, and for the notice to issue, was a sufficient compliance with the requirements of the Rule. He said that after the notice was made absolute, the decree would be transmitted to Calcutta for execution and an application would have to be made to the executing Court under O. 21, R. 11, sub-rule (2) specifying the mode or modes of execution in which the assistance of that Court would be required. It appears that in the Prothonotary's Office, applications under O. 21, R. 16 are made in several forms so far as column (J) is concerned. For instance, in an application in Suit No. 1319 of 1931 dated 14th April 1936, the words in column (J) of the application were as follows :

> By issue of notice under O. 21, R. 16, Civil P. C., and then by transmission of the decree to the Buldana Court for execution against the defendants.

In another application, in Suit No. 439 of 1929 dated 19th December 1934, the words were :

> By issue of the usual notices under O. 21, R. 16, Civil P. C., upon the plaintiff and the defendant to show cause why execution of decree dated 28th June 1929, transferred to the assignee by assignment mentioned in Col. E hereof, should not be granted to him.

Transmission of a decree to another Court for execution is not a mode of execution. Such transmission is only a ministerial act and is usually performed by the Prothonotary and Senior Master on the Original Side. Counsel for the defendants argued that the provisions of O. 21, R. 11, sub-r. (2), must be read along with O. 21, R. 16, and on reading the two together the application must state in column (J) the mode or modes of execution in which the applicant seeks the assistance of the Court. My attention was also drawn to an application in Suit No. 4696 of 1921, in which the applicant asked for an issue of the notice under O. 21, R. 16, and Kania, J. ordered the same to be amended by the addition of the words

> by attachment and sale of the immoveable properties consisting of houses situate in the District of Broach belonging to the estate of the deceased defendant and now in the hands of his heirs and representatives through the District Court at Broach.

There is no judgment stating why such an amendment was required and ordered to be made. It might be that the order was made under the facts and circumstances of the case. There is however no uniform practice in the office, and column (J) in applications for execution under O. 21, R. 16 is still filled up in various forms, though in substance the applicants ask for the issue of the usual notice under that Rule. Counsel for the transferee next referred to S. 39 of the Code and argued that once a decree is transferred to another Court for execution, the decree-holder has to follow the procedure laid down in R. 299 of the High Court Rules, and the requirements of O. 21, R. 11, sub-rule (2), need not be complied with. He said that the transferee only stepped into the shoes of the original decree-holder, and that any application for execution by the transferee need not also comply with the requirements of that Rule. It must however be remembered that an application under S. 39 for transfer of a decree is not an application for execution. It is only an application for a step-in-aid of execution. But a transferee or assignee of a decree must first apply for execution under O. 21, R. 16, and his application under the Rule can only be entertained by the Court which passed the decree. The Court to which the decree is transmitted for execution cannot entertain the same. If it did, it would be an irregularity which might under certain circumstances be waived or acquiesced in by the judgment-debtor.

In my opinion the procedure to be followed in making an application under O. 21, R. 16 falls under two heads. The transferee must first apply for execution of the decree to the Court which passed it, and pray that the usual notice do issue. After the objections have been heard and the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the application was made by a decree-holder. The transferee must then apply for execution of the decree under O. 21, R. 11, specifying the mode or modes in which the assistance of the Court is required. If the decree is to be transmitted, the application under R. 11 must be made to the executing Court. Dealing with the application for execution before me, it appears that as soon as it was filed, an endorsement was made on it by the Prothonotary that notice under O. 21, R. 16 should issue, and the notice was made returnable within a month after the date of the filing of the application. The transferee prays that the notice may be made absolute, after which the decree will be transmitted to the High Court of Calcutta for execution. Once the notice is made absolute, he will have to apply again to the executing Court at Calcutta under O. 21, R. 11, and in that application he will have to specify the mode or modes in which the assistance of that Court will be required under O. 21, R. 11, sub-r. (2) (j). In an application for execution under O. 21, R. 16, the mode in which execution is sought need not be stated at first, for the objections have first to be heard, and then the notice may be made absolute. In this connexion the judgment of the Appeal Court in 36 Bom 58[1] may be mentioned, though the point was not directly in issue in that case. What is first necessary is that the notice required by the Rule must be issued by the Court which passed the decree. Such a notice cannot be issued by the Court to which the decree is sent for execution. It is only when the notice is made absolute that the transferee acquires a right to apply for execution under O. 21, R. 11, sub-r. (2). If the notice is discharged, any application under O. 21, R. 11, sub-r. (2) becomes unnecessary. In my opinion therefore the application for execution by the transferee is in proper form as required by O. 21, R. 16, and there is no reason why it should be rejected.

My attention was drawn to O. 21, R. 17, which provides that upon receiving an application for the execution of a decree as provided by R. 11, sub-r. (2), the Court shall ascertain whether such of the requirements of Rr. 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it. It is further provided that where an application is amended, it shall be deemed to have been an application in accordance with the law and presented on the date on which it was first presented. I have already held that for the purposes of an application under O. 21, R. 16, there need be no application in the first place for the execution of the decree as provided by O. 21, R. 11, sub-r. (2), and therefore there is no question here of any amendment. If however it is held that it is necessary that the applicant must in his application under O. 21, R. 16, also state the mode or modes provided in R. 11, sub-r. (2) (j), the question of allowing an amendment of that application might arise, and since the question has been argued, I will shortly deal with the points taken in argument.

Counsel for the transferee in his closing address said that he would apply for amendment only if the Court was against him as to the validity of the application for execution under O. 21, R. 16. The decree is of December 1921. The application for execution was filed in September 1934, and as the last payment certified on the decree is one of Rs. 3,000 on 31st October 1922, the application for execution is within time under Art. 183, Lim. Act. The application being within time, the Court can in its discretion on receiving the application allow the defect, if any, to be remedied either then and there or within a time to be fixed by it under O. 21, R. 17, sub-r. (1). It was argued that no amendment could now be allowed, as the execution of the decree had become barred by limitation, and there would be considerable delay also in applying for an amendment. Counsel for the defendants relied on a Full Bench judgment of the Calcutta High Court in 17 Cal 631,[2] under which it was held that S. 245 of the Code of 1882, which is substantially the same as O. 21, R. 17, excludes the power of the Court to amend the application for execution after it had once been received by the Court and filed. In that case, the decree-holder asked for the sale of the immoveable property of the judgment-debtor 'as per list'. No list was attached to the application, so that the application did not comply with the requirements of the corresponding section of the Code of 1882, and there being a material defect, no execution could be taken out thereon. The question of limitation within which the amendment could be made was not directly in issue in that suit; it was held that the application was one incapable of execution, and no relief could be granted on it. It seems to me that the Calcutta High Court has taken a very strict view of S. 245 of the Code of 1882, and the observations of the Judges should be understood only as referring to the particular case before them. In the present Code the word 'amended' has been altered into "defect remedied", and sub-r. (2) has been added. The High Courts of Madras and Allahabad seem to be of opinion that the Court has a discretion to allow an amendment under sub-r. (1) of R. 17, O. 21, even if the application for amendment is made after the expiry of the statutory time, and the reasoning seems to be that the law casts a duty upon the Court to notice the defects in the application before admission, and if the Court or its officer had done its duty properly, the defects could have been remedied within time. In my opinion, if the application for execution is within time, but the application for amendment is made after the 12 years have expired, the application for amendment should not be straightway rejected, but must be considered on its merits. The matter being within the discretion of the Court, it would depend upon the nature of the amendment whether it should or should not be allowed after the time limit for execution of the decree had expired. What O. 21, R. 17 (1), requires is a substantial compliance with the requirements of O. 21, Rr. 11 to 14. There would not be in the ordinary course any application for execution which altogether omits to mention the requirements of those rules. If such an application was made, it would not be received in the Prothonotary's office. It may happen however that the application is defective, and it is for the Court to consider whether the defect is of such a nature as could be remedied or not, having regard to the principle laid down by the Privy Council in 6 I A 233[3] that :

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[1] Kassum Goolam Hoosein v. Dayabhai Amarsi, (1911) 36 Bom 58=12 I C 547=13 Bom L R 973.

[2] Asgar Ali v. Troylokya Nath Ghose, (1890) 17 Cal 631 (F B).

> In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

The discretion of the Court must be exercised with regard to all the circumstances of the case, as the ordinary rule of procedure is that an amendment should be allowed only if it could be allowed without prejudice to the rights of the other parties existing at the time of the application for amendment. No amendment for instance will be allowed if there has been an undue delay in the application, or if the defect sought to be remedied is so material as to amount to a defect not merely in form but in substance. If the amendment is allowed, it relates back to the date of the application for execution, but the application for execution must be within time. I need not however pursue this point any further, as I hold that no amendment is necessary.

The next point for determination is whether the assignee was bound to apply for execution against the entire defendant firm and whether therefore the notice issued under O. 21, R. 16, is a proper notice. According to column 1 in the application, the person against whom enforcement of the decree is sought by the transferee is Chandmal Binjraj, one of the partners of the defendant firm and judgment-debtors. The applicant has also stated in that column "rights against other parties are reserved". The notice is addressed to (1) Baijnath Ramchander, viz. the original plaintiff and transferor of the decree, and (2) Chandmal Binjraj, a partner of Binjraj Joowarmal Batia & Co., a firm. The written statement of the firm has been declared by Chandmal Binjraj and the summons was also served upon him. It is open to the decree-holder or the transferee to apply for execution against any one or more of the partners of the defendant firm, as the firm is only a collective name of individuals who are the members of the partnership. The notice however calls upon the persons to whom it is addressed to show cause why the decree should not be executed by the transferee "against you the said defendants". Counsel for the transferee said that the word "defendants" is a mistake, and the word was allowed to remain as such through oversight, though the notice which was originally meant to be addressed to the firm was subsequently addressed only to the particular partner of the firm. I do not think there is any objection to the execution of the decree against the particular partner mentioned. I do not however understand under what rule the transferee's rights against other partners can be reserved. With regard to the point of limitation I have already held that both the applications for execution as well as the notice are in time, as the 12 years' period contemplated by Art. 183 runs from the date of the last payment of Rs. 3,000, certified by the Prothonotary and Senior Master as of 31st October 1922. In the result, the notice must be made absolute as against Chandmal Binjraj, a partner of the defendant firm.

25th September 1936. — I have now heard counsel on the question of costs. Ordinarily a notice under O. 21, R. 16, is made absolute in Chambers without any order for costs. On this notice several points were raised which were put down in the form of what were called issues, and the matter was adjourned into Court

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3. Bissessur Lall Sahoo v. Maharaja Luchmessur Singh, (1879) 6 I A 233=5 C L R 477 (P C).

for argument on those issues. I have held on all the points substantially against Chandmal Binjraj, a partner of the defendant firm, to whom this notice was directed. I therefore order that Chandmal Binjraj do pay the assignee's costs of this notice when taxed less such costs as the assignee would have had to incur on an ex parte application in Chambers for making the notice absolute.

S.C./D.S. *Notice made absolute.*

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* A. I. R. 1937 Bombay 371

BROOMFIELD AND N. J. WADIA, JJ.

Anthony D'Mello and *others* —
Complainants — Petitioners.
v.
Joseph Mathew Pereira — Accused
— Opposite Party.

Criminal Revn. Appln. No. 158 of 1936, Decided on 10th March 1937, against order of Presidency Magistrate, Addl. Court, Bombay.

(a) Criminal Trial— Jurisdiction—Criminal breach of trust—Accused, servant of complainant, serving as travelling salesman at Bombay—Accused selling goods at Karachi—Failing to produce at Bombay money received for goods sold — Complaint for criminal breach of trust filed in Bombay Court — Where actual misappropriation took place not clear—Until that was decided, Bombay Court could not discharge accused—Safe course would have been to lodge complaint at place where goods were actually sold and money received—As there was uncertainty of jurisdiction, even Bombay Court could try accused.

An accused who was a travelling agent of the complainant was entrusted with some ornaments for sale while he was on tour. The accused sold the articles at Karachi and returned to Bombay, the place of business of his master. There he failed to produce the money for the goods sold by him and hence a complaint was lodged against the accused at Bombay for criminal breach of trust. The trial Court holding that goods were sold and money received outside Bombay held that the Bombay Court had no jurisdiction to try the accused:

Held: that it was not clear whether the money received for the goods sold was actually misappropriated in Bombay or at any place outside Bombay. Hence Bombay Court could not discharge the accused simply on the ground of want of jurisdiction, unless it was established as to where the actual misappropriation took place. [P 372 C 2; P 373 C 1]

Held further: that it would have been safe for the complainant to lodge his complaint at Karachi or any other place where the goods were sold, but that did not deprive the Bombay Court of its jurisdiction. [P 372 C 1]

Held also: that under S. 182, Criminal P. C., due to uncertainty of jurisdiction, even the Bombay Court could try the accused: *19 All 111* and *32 All 397*, *Rel. on*; *A I R 1930 Bom 490 (F B)*, *Disting.* [P 372 C 2]

(b) Criminal Trial—Jurisdiction—Criminal breach of trust—Accused serving under complainant at Bombay selling goods and receiving money at Karachi—Money not produced at Bombay when demanded—Accused bound to render accounts and money at Bombay —Whether Bombay Court has jurisdiction (*Quaere*).

Quaere.—An accused who was a travelling salesman of the complainant at Bombay, sold goods on his behalf at Karachi and failed to produce the money at Bombay when so demanded. Whether the fact that the accused was bound to render the accounts and money to the complainant at Bombay would give Bombay Court jurisdiction to try a complaint for criminal breach of trust in respect of that money: *A I R 1931 Cal 528* and *A I R 1928 Rang 217*, *Ref.* [P 372 C 2]

M. M. Thakor and *U. L. Shah* —
for Petitioners.
T. M. Guido and *J. L. D'Souza* —
for Accused.
P. B. Shingne — for the Crown.

Broomfield, J.—This is an application for revision of an order of discharge made by the Presidency Magistrate, Additional Court, Esplanade, Bombay, in a case of criminal breach of trust. The prosecution was instituted on behalf of a firm called the Excelsior Trading Company, which appears to be a one man firm owned by Gomes, petitioner 2, dealing in rolled gold ornaments and other articles. So far the only evidence in the case consists of the deposition of petitioner 1 who is the accountant in this firm. His evidence is that the accused was employed by the firm as a travelling salesman and canvasser. He was given articles valued at about Rs. 4,500 for sale, and on 11th November 1935, he left Bombay to travel in Gujarat and Karachi. He returned to Bombay on 16th December 1935, and was asked to render his accounts. Between 17th and 19th December, he came to the office every day and returned all the goods which were entrusted to him except goods of the value of Rs. 198-8-0. With regard to these he produced cash memos showing that the goods had been sold. He was asked to produce the money for these goods but failed to do so. He never has produced the money. On 6th January 1936 he was dismissed. On 7th January 1936 a letter was received from the accused's pleader with which a statement of account was sent and it was stated that he was unable to produce the money unless given time. The prosecution case is that he committed criminal breach of trust in respect of this sum of Rs. 198-8-0. The learned Magistrate in his order says:

> Mr. D'Cunha for the prosecution admits that these goods were sold outside Bombay, in Karachi and other places. The criminal breach of trust with which the accused is charged is in respect of the money which the accused had received outside Bombay by the sale of these goods. In my opinion the facts of this case are covered by the decision of the Full Bench of the Bombay High Court reported in 55 Bom 59[1] and that this Court has no jurisdiction to try this case. Accused is discharged.

In my opinion the learned Magistrate's finding that he has no jurisdiction is at any rate premature. It is true that the allegation against the accused is that he committed criminal breach of trust in respect of moneys which were received by him outside Bombay. But it does not follow that the misappropriation took place outside Bombay. We are informed that the complainant's case is that the accused had to hand over the money in Bombay, that there was no question of misappropriation until he was called upon to hand it over and failed to do so and that the breach of trust consisted of the dishonest retention of the money or some of it in Bombay. There is nothing in the evidence so far recorded which is inconsistent with this case. It is true that the police charge-sheet states the charge to be that the accused at Bombay between 11th November 1935 and 16th December 1935 did commit criminal breach of trust as a servant in respect of rolled gold jewellery valued at Rs. 198-8-0. But the prosecution is not limited to the form of charge which the police have chosen to put in the charge-sheet. The prosecution case being, as apparently it is, that the accused brought the money or some of it to Bombay, the case is prima facie governed either by S. 177 or S. 181 (2), Criminal P. C. It may no doubt be difficult for the prosecution to prove that any part of the offence of criminal breach of trust was in fact committed in Bombay and it would have been safer I think to lay the venue in Karachi or one of the places where the proceeds of the goods sold were admittedly received. The Court there would have jurisdiction having regard to S. 181 (2) wherever the actual misappropriation took place. But it is impossible to say at this stage that the Bombay Court has no jurisdiction.

There is S. 182 of the Code also to be considered. If there is a doubt as to whether the criminal breach of trust was committed in Karachi, for instance, or Bombay, that I think would give the Bombay Court jurisdiction. 32 All 397[2] is a case in which the facts were almost precisely similar. One *M* was employed as an agent by a firm in Mirzapur. Goods were entrusted to him for sale in various districts in lower Bengal, and from time to time as he sold goods he remitted money to his employers at Mirzapur. When called upon to furnish accounts, he offered to furnish Rs. 500 as a deposit, but did not submit any account. It was held that the Courts at Mirzapur had jurisdiction to try *M* for criminal breach of trust. No doubt Tudball, J. followed an earlier decision of the Allahabad High Court, 19 All 111,[3] where jurisdiction was said to depend upon S. 179. That is contrary to the view which has been taken by a Full Bench of this Court in 55 Bom 59.[1] But the learned Judge also said: "S. 182 of the Code would apply, it seems to me, equally well". I can see no reason why S. 182 should not be applied if the facts are as alleged. Of course if it should appear, after all the evidence is heard, that there is really no doubt about the matter that there was no misappropriation or conversion or wrongful disposal in Bombay at all, and that if any offence was committed it must have been outside Bombay, the plea of want of jurisdiction would have to be sustained and there could be no conviction. But that stage has not been reached.

Jivandas Savchand, In re,[1] relied on by the Magistrate does not cover the facts of this case. There was no allegation there that any money was payable in Bombay or had been misappropriated in Bombay. The Full Bench was only concerned, directly at any rate, with the application of S. 179 which is not relied upon in the present case at all. It is not apparently the case of the petitioners that the Bombay Court has jurisdiction because it was the duty of the accused to account in Bombay, nor indeed has that fact been proved as yet. There is some authority for that view. I may mention 59 Cal 92[4] and

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[1] *In re* Jivandas Savachand, A I R 1930 Bom 490=129 I C 385=1930 Cr C 1026=55 Bom 59=32 Bom L R 1195 (F B).

[2] Emperor v. Mahadeo, (1910) 32 All 397=6 I C 563=11 Cr L J 372=7 A L J 319.

[3] Queen-Empress v. O'Brien, (1896) 19 All 111=1896 A W N 191.

[4] Paul De Flondor v. Emperor, A I R 1931 Cal 528=1931 Cr C 680=134 I C 433=59 Cal 92=32 Cr L J 1167=35 C W N 809.

6 Rang 380.[5] There is no doubt that that is the rule in England. The difficulty seems to me to be to reconcile such a rule with the provisions of the Criminal Procedure Code. However, as the petitioners do not, as I say, put their case on that ground and as the point has not been argued before us, I prefer to express no opinion on that aspect of the case. Quite apart from it, it is clear that the learned Magistrate's order of discharge is wrong and must be set aside.

N. J. Wadia, J.—S. 181 (2), Criminal P. C., provides that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed, and the question in this case is whether the offence can be tried in Bombay. The applicants' contention is that it was only when the accused returned to Bombay on 16th December 1935, and failed to produce the money when called upon, that the complainant knew that he had misappropriated it, and that as the accused had to account for the goods and money in Bombay it must be presumed that the dishonest misappropriation or conversion had been committed in Bombay between 16th and 19th December, during which period the accused attended the office in Bombay and produced the unsold goods but failed to pay up the price of the goods sold.

The learned Government Pleader who appears for the Crown supports the application for revision. The facts in *Jivandas Savchand, In re*,[1] on which the learned Magistrate has relied, were in my opinion very different from those in the present case. In that case the complainant had entered into a partnership with the accused in Bombay in a business to be carried on at Rangoon. Under the partnership agreement, the head office of the firm was to be in Bombay and accused 1 was to manage the business at Rangoon in accordance with the instructions issued to him by the complainant. Accused 1 was to send to the head office weekly statements of accounts of the business transacted by him on behalf of the partnership. The accounts of the partnership were agreed to be made up once in a year, the profit and loss account to be forwarded by accused 1 to the head office immediately after the accounts were made up, and the distribution of profit and loss was to be entered up thereafter in accordance with the instructions received from the head office. Accused 1 went to Rangoon, and used to send weekly statements of accounts to the head office in Bombay. On examination of the accounts sent by the accused, the complainant discovered that the accused had dishonestly misappropriated large sums of moneys belonging to the firm and had falsified accounts. The charge against the accused there was that the accused misappropriated the firm's moneys in Rangoon and falsified the accounts in Rangoon, and the question was whether they could be tried for those offences in Bombay. On the admitted facts they could not be tried in Bombay under S. 181, Criminal P. C. It was contended that they could be tried in Bombay under S. 179 of the Code. The Court held that S. 179 was not applicable because the loss to the principal, which had occurred in Bombay, was not a necessary ingredient in the offence of criminal breach of trust, and that although the accused had to render accounts, and did in fact deliver accounts alleged to be false in Bombay, it did not amount to a dishonest use of the money in Bombay and therefore the Bombay Court had no jurisdiction. It could not be said in that case that there had been a dishonest use in Bombay of money or property which had admittedly never left Rangoon.

The applicant in the present case does not rely on S. 179 and the decision in *Jivandas Savchand, In re*,[1] is not therefore directly in point. According to the applicant the dishonest misappropriation or conversion took place in Bombay between 16th and 19th December, and if the applicant can prove this, the offence would have been committed in Bombay itself and not in Karachi or anywhere in Gujarat, where the articles are said to have been sold and the money received by the accused. Certain remarks of Madgavkar, J. in *Jivandas Savchand, In re*[1] appear to me to be very appropriate to the case before us. After referring to the decision of Mukerji, J. in 29 C W N 432,[6] he said (p. 85):

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[5] Yacoob Ahmed v. V. M. Abdul Ganny, A I R 1928 Rang 217=6 Rang 380=29 Cr L J 940.

[6] Gunananda Dhone v. Lala Santi Prakash Nandy, A I R 1925 Cal 613=86 I C 213=26 Cr L J 725=29 C W N 432=41 C L J 80.

I agree entirely with the view of the learned Judge that criminal breach of trust is not an offence which counts as one of its factors the loss, which is the usual consequence of the act, and that it is the act itself which in law amounts to the offence, apart from any such consequence; and therefore the jurisdiction to try an offence of criminal misappropriation or criminal breach of trust is governed by S. 181, sub-s. (2), and not by S. 179. The only doubt in my mind is as regards the class of cases referred to in the concluding portion of the judgment, where by reason of the secrecy observed by the accused, a doubt exists as to the exact manner, point of time or place where the misappropriation and conversion, etc., takes place, all matters within the special knowledge of the accused himself, and not of the complainant who can only judge from any overt act of the accused showing the dishonesty, which is essentially necessary to be proved. In such cases, if and where the accused is under liability to render accounts at a particular time and fails to do so, such failure may be the first overt dishonest act to the complainant's knowledge, and the Court within the local limits where such failure takes place may have jurisdiction. But where the offence is completed at one place, the further liability to render accounts at another place and failure in rendering such false accounts at the second place does not confer jurisdiction under S. 179 upon the Magistrate at the latter place since the offence is already completed at the former place. At the same time, as is conceivable, where the offence is not completed as far as the knowledge and belief of the complainant goes, in the place where the money was first sent, but the dishonest intent which is a necessary ingredient is only completed not merely as evidence but actually as factum of dishonesty by some act such as the rendering of accounts, then I am unable to say that even under S. 181, sub-s. (2), the criminal Courts in the latter place are excluded from jurisdiction. In my opinion the matter entirely depends upon where the act of criminal misappropriation including the dishonest intent is completed as far as the knowledge and belief of the complainant according to the complaint go. In such a case I agree with Mukerji, J. that the Courts in the place where the act is completed may have jurisdiction even though they may be different from the place where the money has been originally sent by the complainant.

Although the mere fact of non-accounting cannot constitute the offence of criminal breach of trust, it may in certain circumstances be evidence from which dishonest misappropriation or conversion in Bombay might be inferred if complainant succeeded in showing that the accused had the money with him in Bombay between 16th and 19th December. At this stage of the case therefore it is not possible to say that no offence was committed in Bombay at all. Reference may also be made to S. 182, Criminal P. C., under which when it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. In *Emperor* v. *Mahadeo,*[2] in which the facts were very similar to those before us, it was held that S. 182 would apply to such a case. The view taken by the learned Magistrate that he had no jurisdiction is therefore in my opinion wrong. I agree with the order proposed to be made.

Per Curiam.—Rule absolute. Order of discharge set aside. Case to be proceeded with according to law.

B.D./R.K. *Rule made absolute.*

A. I. R. 1937 Bombay 374

B. J. WADIA, J.

In re *Sabnis, Goregaonkar & Senjit* — Applicants.

Shivramdas and *others* — Plaintiffs.

v.

B. V. Nerurkar and *others*—Defendants.

Application in O. C. Suit No. 1736 of 1928, Decided on 25th November 1936.

(a) Trusts—Creation of—Mere appointment of person as trustee does not by itself constitute title in him—Trust is not complete unless trust property is vested in trustee for benefit of cestui que trust—Mere use of word trustee does not make him trustee in legal sense unless legal ownership is shown in trustee—Management of property does not necessarily make manager trustee in law.

There is a distinction between the appointment of a trustee and his title to the trust property of which he is appointed trustee; the appointment by itself does not constitute his title until the vesting and the transfer, though no doubt the appointment precedes the transfer in the ordinary course. The word 'trustee' is a compendious word which covers a very large number of relationships involving different obligations. A man may be said to be a trustee in the general sense that every man is a trustee to whom is entrusted the duty to manage and control the property of others, even though the ownership of the property is not transferred to him. A trustee in the legal sense of the word is one in whom the trust property is absolutely vested. The mere use, therefore of the word "trustee" in a document cannot make a person trustee in the legal sense, unless he can show that he has got the legal ownership of the immoveable properties. Without a transfer his title is inchoate. A trust is not complete until the trust property is vested in trustee for the benefit of the cestui que trust. In order that a person may be a trustee whether express or constructive, he must be a legal owner of the property. Management of property does not necessarily make the manager a trustee in law. Trustees are managers because they have to control and manage the trust property but all managers are not necessarily trustees, though they may be answerable in the general sense of the word for maladministration. For instance, an administrator of the estate of an intestate has also got to manage it, but he is not a trustee within the meaning of S. 3, Trusts Act : *A I R 1921 PC 105*; *A I R 1922 P C 235*; *A I R 1922 P C 123*; *8 Bom L R 498 (P C)* and *12 Bom L R 53*, *Rel. on.* [P 378 C 1, 2 ; P 379 C 1]

(b) Trusts Act (1882), S. 1—Public trust—Applicability—Act does not apply to religious or charitable endowments by analogy—Indian Courts should be guided by rules of English law in such matters unless such rules are inconsistent with rules of Indian Courts.

It is not correct to say that the provisions of the Trusts Act should guide Courts in India by way of analogy in the matter of public trusts, for that would amount to doing that which the Legislature has expressly prohibited. The correct position is that in matters relating to public and charitable trusts, the Courts in India would be governed by the principles and rules of English law and practice on the subject, unless the English law or practice is inconsistent with the rules or practice of the Courts in India. It is true that many of the provisions of the Trusts Act reproduce the general law of trusts as administered in Equity Courts in England, but that does not mean that the Trusts Act applies by analogy to religious or charitable endowments when the Act provides that it does not : *A I R 1935 Bom 150*, *Rel. on.* [P 379 C 2 ; P 380 C 1]

(c) Trusts Act (1882), S. 50—Scope—S. 50 applies to express or constructive private trusts and not to public trusts—Principles of English Law of Trusts govern public and charitable trusts — Solicitor-trustee, defendant to suit relating to trust property with other co-trustees—His firm acting on his behalf and on behalf of other co-trustees—His firm is entitled not only to out-of-pocket costs but also to profit costs and will be taxed as between attorney and client.

Voluntary service is the foundation underlying trusteeship in law, and the law precludes a trustee from making a profit or acquiring a benefit from his office as trustee. Generally speaking, a trustee must administer the trust gratuitously, and this rule applies even though the execution of the trust involves considerable loss of time, work and personal inconvenience, unless there is a provision to the contrary in the trust instrument, or if he contracts either with the beneficiaries, if they are competent, or with the Court, to receive remuneration for his work. S. 50, Trusts Act, though it reproduces in substance a principle of the English law of Trusts, only applies to express or constructive private trusts but does not apply to public and charitable trusts. The circumstances of a solicitor being a trustee will not prevent him from receiving his usual costs where he acts as solicitor in a suit for any of the beneficiaries or where he acts for himself and his co-trustees jointly, provided the costs are not increased by his being one of the parties for whom such joint appearance is made; this rule is only a rule of taxation of costs and it is not repugnant to the principle engrafted in S. 50 of the Act. This rule as to payment of costs is not restricted to trustees in the strict legal sense of the term, but it extends to all persons who stand in a fiduciary position though they may not be "trustees" in the strict legal sense. A solicitor trustee is bound to protect the title to the trust property, and for that purpose defend a suit without remuneration; but he is under no obligation to do so in his professional capacity also for his co-trustees. [P 380 C 1,2 ; P 381 C 2 ; P 382 C 1]

Where therefore a solicitor trustee is a defendant to a suit relating to the trust property and the solicitor trustee and his firm act on his behalf and the other co-trustees, his firm will be entitled not only to their out-of-pocket costs but also to profit costs taxed as between attorney and client : *Bray* v. *Ford*, *(1896) A C 44* ; *York* v. *Brown*, *1 Coll C C 260* and *Cradock* v. *Piper*, *1 Mac & G 664*, *Foll.* ; *Case law discussed.* [P 381 C 2 ; P 382 C 1, 2]

F. J. Coltman and *Sir Jamshed Kanga* — for Applicants.

M. C. Setalvad — for Defendants — Respondants.

Judgment. — This is a Chamber Summons taken out by the applicants who are a firm of solicitors of this Court against the respondents who were the defendants in the suit in the matter of the costs incurred by them in defending the suit on behalf of the defendants. The applicants claim both their out-of-pocket and profit costs of the suit, notwithstanding that their senior partner, Mr. S. A. Sabnis, was one of the defendants. The respondents contended before the Taxing Master that the applicants were not entitled to any profit costs, but only to their out-of-pocket. The Taxing Master held in favour of the respondents' contention, on which the applicants filed their objections. These objections were considered by the Taxing Master, and he gave his judgment on 16th January which is attached to his certificate dated 17th January 1936. The Taxing Master held that the defendants in the suit were trustees of the temples, charitable institutions and funds belonging to the Gowd Saraswat Community of Bombay, including the property in suit, and not merely managers of the same, and that the applicants were entitled only to their out-of-pocket costs and a further sum in respect of their office expenses in the conduct of the suit. The matter has now come up before me on a review of the taxation.

The suit was filed by the plaintiffs with the sanction of the Advocate-General for a declaration that the Bhuleshwar Tank, situate at Bhuleshwar Street in the vicinity of several temples, which was the subject matter of the suit, was a public charity for the Hindus of all communities for religious and ceremonial purposes, that the defendants who were described as the "trustees of the temples, charitable institutions and funds of the Gowd Saraswat Community of Bombay" had no right or interest in the tank and should be restrained from filling it up, and that a scheme may be framed by the Court, and for other reliefs. The suit was filed on 18th August 1928. It reached hearing in 1934, and on 6th April 1934 it was allowed to be dismissed by consent of parties, no order being made as to costs. The applicants thereupon lodged their bill of costs for taxation between attorney and client, to which objections were taken. The question therefore for consideration is, on what basis should the applicants' costs of the suit be taxed? It is contended on behalf of the defendants that they are express trustees of the charity properties, or in any event they are what are called constructive trustees. It is common ground that there is no trust instrument in respect of any of these properties, nor is there any endowment by the founder or founders, nor are there any specific trusts declared by a decree or order of the Court. There is also no scheme for the administration of the charities framed and sanctioned by the Court. In para. 11 of his affidavit in reply on this summons Mr. Nerurkar, one of the defendants, says that these religious trusts have been in existence for over two hundred years. He further says:

> The origin of the trust is not definitely known to me, but it is commonly believed that the trust originated by some donor building a temple and dedicating certain property to the temple for the purpose of management and maintenance of the temple and worship thereat.

He mentions six temples in the city with the management and administration of which the community is concerned. There are immoveable properties dedicated to the temples, and there are also trust funds consisting mostly of Government Securities and Municipal Bonds of the present face value of about Rs. 1,50,000. According to him, there has been from time immemorial a religious and charitable trust in respect of these properties. In 1896 a suit was filed by several members of the community in this Court, being Suit No. 43 of 1896, against other members, in which the plaintiffs claimed a declaration from the Court that they were properly appointed trustees, and that the defendants should hand over the trust properties to them and render an account of their management. A decree was passed on 10th January 1898 by which the Court directed a meeting of the community to be held on 16th January under the presidency of the then Prothonotary of the Court for passing resolutions as to the election of seven new trustees and two auditors of the trust properties. The meeting was accordingly held, and the president made his report to the Court. Thereafter by a further order dated 21st January 1898 the Court declared that the first seven plaintiffs in that suit were duly appointed trustees, and the first seven defendants were ordered to hand over charge of all the properties and transfer the same to the newly appointed trustees and to render accounts to them. No such transfer was made in respect of the immoveable properties belonging to the charity. A scheme was asked for in the suit but none was framed. What happened thereafter was that in October 1900 certain rules and regulations were passed at a meeting of the community, and the defendants say that the charity properties have been managed and administered by them and their predecessors in accordance with those rules and regulations. No vesting order was made in respect of the properties, nor was there any declaration by the trustees declaring that they held the properties on trust. I will deal with the rules and regulations framed at the meeting of the community in October, 1900 presently. The respondents claim to have been appointed "trustees" in accordance with those rules and regulations. The applicants, on the other hand, deny that the respondents were or are "trustees" as alleged. Under S. 3, Trusts Act, a 'trust' is defined as:

> an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

The person accepting the confidence is called the trustee. Reading the two parts together, a trustee, shortly put, is a person who accepts a confidence which gives rise to an obligation annexed to the ownership of property. A trust is thus annexed to the ownership of property. It may be an express trust by reason of the act and intention of the parties, or it may arise by operation of law irrespective of the declared or supposed wishes of the parties, in which case it is called a constructive trust, corresponding to what is called an obligation in the nature of a trust under Ch. 9, Trusts Act. It is this ownership, however, which gives control to the trustee over the trust property.

Under the English law it is called the legal estate which a trustee usually has, unless the property that is settled on trust is itself an equitable interest, e. g. an equity of redemption in a property mortgaged to a third party. In India there is no distinction between legal and equitable estates in the sense in which it is understood in England, as was pointed out by the Privy Council in 58 I A 279[1] at p. 297. But it is necessary that the trust property should effectually vest in the trustee, properly so called, for he holds the legal ownership; and under S. 12, Trusts Act, it is incumbent upon him to obtain, where necessary, a transfer of the trust property to himself. As a general rule, a transfer of property to the trustee is one of the conditions necessary for a valid trust. Where the trust is declared by will, or the settlor is himself to be the trustee, no such transfer may be necessary. With regard to the moveable property belonging to the community, consisting of securities which are now of the face value of about Rs. 1,50,000, it appears that these were transferred by endorsement to the names of the seven persons appointed by the community at different times to manage the charity properties. Mr. Sabnis, solicitor, was appointed in or about 1927, but he finally resigned in 1935. During his time securities worth about a lakh of rupees were endorsed to his name along with the six other persons also appointed for the purpose. These securities, it was stated in evidence, were, according to arrangement, transferable on the signatures of any three of the seven persons. Mr. Sabnis has not endorsed any one of them, but he must have known that those particular securities were endorsed to his name as one of the seven. It is difficult to understand why the immoveable properties belonging to the charity were not transferred to the trustees in spite of the order of the Court of January 1898. It is still more difficult to understand how it can be said, as is stated by Mr. Nerurkar in his affidavit, and by Mr. B. S. Sabnis in his evidence, that the immoveable properties have vested in the "trustees." The fact that they stand in the Collector's record or the Municipal record in the collective names of the "trustees" does not mean that the immoveable properties were vested in them. As a matter of fact the Bhuleshwar Temple and Tank stood in wrong names in the Collector's record for a long time until it was corrected in 1935.

Counsel for the respondents argued that there was no need for a vesting order to constitute the title of the persons who were declared trustees by the Court in 1898, that the appointment of a trustee and the vesting of the property in him are two distinct and separate matters, and the appointment itself constitutes the trustees owners of the trust properties. He relied on 14 Beav 471[2] at p. 478 where it is stated that the vesting and the transfer can only properly take place when the appointment of the trustees is complete. In that case two trustees were originally appointed by a deed. One of them disclaimed, as having never acted at all, and the other retired. Thereafter two new trustees were appointed by the settlors, but the trust fund was assigned by the retiring trustee alone to the new trustees. It was held that both the new trustees were validly appointed though the trust fund had not effectually vested in them. Under the power of appointment reserved to the settlors they had first to appoint new trustees and upon appointment the trust property was to be transferred to them.

The appointment of trustees was held to be complete as soon as it was made. I have already stated that under the Court's order made in January 1898, the seven persons there mentioned were appointed trustees, but the Court also ordered that the properties were to be transferred to the newly appointed trustees. It is pointed out by Halsbury, Vol. 28, Para. 216, at p. 102, that on an appointment of new trustees the trust-property ought to be vested in all the persons who, after the appointment, are the trustees thereof. A trustee cannot execute a valid conveyance of trust-property unless it is vested in him. There was, however, as I have said before, no transfer of the immoveable properties to the names of the trustees, and the transfer of the securities does not affect the position with regard to the immoveable properties which were not vested in the trustees. There is a distinction between the appointment of a trustee and his title to the trust property of which he is appointed trustee; and in my opinion the appointment by itself does not constitute his title until the vesting and the transfer, though no doubt the appointment precedes the transfer in the ordinary course.

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[1] **Chhatra Kumari Devi v. Mohan Bikram Shah, A I R 1931 P C 196=133 I C 705=58 I A 279=10 Pat 851 (P C).**

[2] **Noble v. Meymott, (1851) 14 Beav 471 = 20 L J Ch 612.**

The next appointment of trustees was made in 1900 after the rules and regulations had been framed. There was no particular period of time during which the trustees appointed under the order of 1898 were to hold office, and it is not clear whether by 1900 they were all dead or had retired or were removed. New rules were made and a new board came into existence in 1900. The rules were made at a meeting held on 7th October 1900, and according to the heading these rules were made "for the management of the temples, charitable institutions and funds of the said community". It was laid down in R. 1 that:

> As regards the elections of the managers (trustees) and the (auditors) for the management of the said temples, charitable institutions and funds, they shall be elected at a public meeting of the community to be held for the said purpose every year.

The English word "trustees" is put in the Balbodh characters in parenthesis after the word "managers"; after that, throughout the rules they are referred to as "trustees". These rules were not submitted to the Court, but it was argued that that was unnecessary. The respondents claim to have been appointed "trustees" under these rules. The question arises whether they were trustees in law, or merely managers of the charity properties. The mere use of the word "trustees" does not matter; what matters is the substance underlying the word. It is true that the plaint in the suit describes the defendants as "trustees", and the defendants, of whom Mr. Sabnis was one, say in their written statement that they are "trustees". The resolution appointing Mr. Sabnis does not describe him as a trustee, though the meeting called for the purpose was for the election of "trustees". In fact there is no resolution appointing any one else as "trustee", according to the evidence of Mr. B. S. Sabnis, so far as he is aware. It is immaterial whether the defendants are described or describe themselves as "trustees". As pointed out by the Privy Council in 47 I A 224[3] at p. 232, the word "trustee" may sometimes, as in the deed in question in that suit, be misleading, and that a man may be said to be a trustee in the general sense that every man is a trustee to whom is entrusted the duty to manage and control the property of others, even though the ownership of the property is not transferred to him. A trustee in the legal sense of the word is one in whom the trust property is absolutely vested: *see* 48 I A 258,[4] in which it was pointed out by Lord Buckmaster at p. 265 that the word "trustee" is a compendious word which covers a very large number of relationships involving different obligations: *see also* 48 I A 302[5] at p. 309. It was also pointed out in an earlier Privy Council case, 8 Bom L R 498,[6] that the manager of properties attached to a temple is in the position of a trustee. It does not say that he is a trustee in the restricted and technical sense known to the law. The use, therefore, of the word "trustees" cannot make the defendants trustees in the legal sense, unless they can show that they have got the legal ownership of the immoveable properties. Without a transfer their title is inchoate. A trust is not complete until the trust property is vested in trustees for the benefit of the cestui que trust: *see* Mulla's Transfer of Property Act, Edn. 2, p. 672. In my opinion, management of property does not necessarily make the manager a trustee in law. Trustees are managers because they have to control and manage the trust property, but all managers are not necessarily trustees, though they may be answerable in the general sense of the word for maladministration. For instance, an administrator of the estate of an intestate has also got to manage it, but he is not a

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3. Muhammad Rustam Ali v. Mushtaq Husain, A I R 1921 P C 105=57 I C 329=47 I A 224 =42 All 609 (P C).
4. Peary Mohan Mukerji v. Monohar Mukerji, A I R 1922 P C 235=62 I C 76=48 I A 258= 48 Cal 1019 (P C).
5. Vidya Varuthi Thirtha v. Balusami Ayyar, A I R 1922 P C 123=65 I C 161=48 I A 302 =44 Mad 831 (P C).
6. Ramanathan v. Murugappa, (1906) 29 Mad 283=33 I A 139=8 Bom L R 498 (P C).

trustee within the meaning of S. 3, Trusts Act: 12 Bom L R 53[7] at p. 70.

The defendants, therefore, cannot be said to be express trustees. Can it be said that they are constructive trustees? Counsel referred to S. 94, Trusts Act, which provides that in any case not coming under the preceding sections of Chap. 9 of the Act, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands. It was argued that the defendants were in possession of the property, but that they had not the whole beneficial interest therein, as they along with the entire community had the whole beneficial interest in the same. What is the nature of the possession claimed by the defendants in respect of the immoveable properties? In order to be trustees, whether express or constructive, the trustees must be the legal owners of the property, for a trust is an obligation annexed to the ownership of property, whether the obligation arises by the act and intention of the parties or by operation of law. These defendants were at no time the owners of the immoveable properties, as the same had not vested in them, nor in any preceding group of seven persons appointed to manage the properties. The legal title was not in them. The Taxing Master was in error when he stated in his judgment that there was a deed of appointment of new trustees. It is common ground that there never was any.

Under these facts and circumstances I hold that the defendants were neither express nor constructive trustees, according to the law, of the properties of which they were in management. They were managing the same on behalf of the community, standing in a fiduciary relationship, that is, in a position analogous to that of trustees, and liable to account; but they were not trustees in the strict accepted legal sense of the term. The rules and regulations made in 1900 were really rules of management, and the word "trustees" has been introduced in those rules merely as a convenient mode of description. If, however, the defendants are trustees strictly so called, of a public charity trust, the next question is whether the applicants are entitled only to their out-of-pocket costs of the suit and their office expenses, or also to their profit costs. The Taxing Master has held, as I have already stated, that they were not entitled to any profit costs. He refers in his judgment to S. 50, Trusts Act, which provides that:

> In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill, and loss of time in executing the trust.

Section 1 of the Act expressly saves from its operation, all public or private religious or charitable endowments, but the Taxing Master says in his judgment that though

> it has been held by the Bombay High Court that though the Trusts Act does not apply to religious or charitable endowments, the provisions of the Trusts Act (one being that a trustee should not make any profit out of his trust) reproducing as they do the general law of trusts, as administered in Equity Courts, should govern the procedure in India.

For this statement he relies on two cases, one of this Court, 1 Bom L R 667[8] and another, being a judgment of the Appeal Court of Madras, 39 Mad 597.[9] He has accordingly held that the provisions of the Trusts Act should act as a guide by analogy in matters relating to public trusts, but I do not think that either of the two cases he relies on has laid down anything so broad as that. In my opinion, it is not correct to say that the provisions of the Trusts Act should guide us by way of analogy in the matter of public trusts, for that would amount to doing that which the Legislature has expressly prohibited. The correct position is that in matters relating to public and charitable trusts, the Courts in India would be governed by the principles and rules of English law and practice on the subject, unless, to use the words of the Appeal Court in 59 Bom 443,[10] the English law or practice is inconsistent with the rules or practice of this

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[7] Ardeshir v. Manchershaw, (1909) 12 Bom L R 53=5 I C 633.

[8] Rambabu v. Committee of Rameshwar, (1899) 1 Bom L R 667.

[9] Nethiri Menon v. Gopalan Nair, A I R 1916 Mad 692=30 I C 713=39 Mad 597=29 M L J 291.

[10] D. N. Rege v. V. C. Vijayakar, A I R 1935 Bom 150=155 I C 945=59 Bom 443=37 Bom L R 39.

Court. For instance, it was held in 35 Bom L R 554,[11] following the English law, that a solicitor acting for a non-existent party was personally liable for costs. It is similarly laid down by R. 659 of our High Court Rules that the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with the rules of this High Court and with the principles of the Succession Act and the Civil Procedure Code. It is also similarly laid down in R. 771 that in cases not provided for by the rules or by the rules of procedure laid down in the Companies Act, the practice and procedure of the High Court of Justice in England in matters relating to companies shall be followed so far as they are applicable and not inconsistent with these rules and the Act. It is true that many of the provisions of the Trusts Act reproduce the general law of trusts as administered in Equity Courts in England, but that does not mean that we should say that the Trusts Act applies by analogy to religious or charitable endowments when the Act provides that it does not. S. 50, Trusts Act, which I have above referred to, reproduces in substance a principle of the English law of trusts. That section is applicable to express private trusts, and according to S. 95 constructive trustees are also, so far as may be, subject to the same liabilities and disabilities as trustees under an express trust.

What we have, however, got to consider in this case is something more than the principle embodied in S. 50, Trusts Act, for here we have seven trustees one of whom was a solicitor-trustee who or whose firm acted on behalf of himself and his co-trustees. It is true that voluntary service is the foundation underlying trusteeship in law, and the law precludes a trustee from making a profit or acquiring a benefit from his office as trustee. Generally speaking a trustee must administer the trust gratuitously, and this rule applies even though the execution of the trust involves considerable loss of time, work and personal inconvenience, unless there is a provision to the contrary in the trust instrument, or if he contracts either with the beneficiaries, if they are competent, or with the Court, to receive remuneration for his work. This rule has been laid down in the old well-known case in 3 P Wms 249,[12] and it proceeds upon the principle that a trustee, executor, or administrator shall have no allowance for his care and trouble. The reason given by Lord Talbot, L. C. at p. 251 is that the trust estate may be otherwise loaded and rendered of little value, but it is more generally put on the ground of prudence that a trustee may not put himself in a position in which his interest and duty come in conflict : *see* 1 Mac & G 668*n*.[13] The incapacity applies not only to the solicitor-trustee personally, but also to his firm who act as his solicitors. In 1 Mac & G 668*n*[13] the solicitor-trustee was acting only for himself. A solicitor-trustee is not bound to act professionally also for his co-trustees. The applicants rely on another rule which modifies the general rule, and that was laid down in 1850 in 1 Mac & G 664.[14] It was held by Lord Cottenham in that case, affirming Shadwell, V. C., that the circumstance of a solicitor being a trustee will not prevent him from receiving his usual costs where he acts as solicitor in a suit for any of the beneficiaries or where he acts for himself and his co-trustees jointly, provided the costs are not increased by his being one of the parties for whom such joint appearance is made. As pointed out by Lord Cottenham in the course of the argument (p. 673) :

> A trustee, as trustee, is not to make his office a source of remuneration; but the question is whether acting for other parties is an acting arising out of his office. If *A* is a trustee of a fund, and employs himself, this is clearly within the rule; but it is not the same thing if there are other parties, and they come and employ him, though this employment may arise incidentally out of his being a trustee.

This case was mentioned in 9 Hare 158[15] at p. 160 in which Turner, V. C., considered the rule as established, but limited it to costs incurred in respect of business done in a suit or matter in Court. It was disapproved of in 2 Macq H L 80[16] and 5 De G M & G 160.[17] But Chitty, J.

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[11] Dhanrajgirji v. Payne & Co., A I R 1933 Bom 317=145 I C 641=58 Bom 1=35 Bom L R 554.

[12] Robinson v. Pett, (1743) 3 P Wms 249=24 E R 1049.

[13] New v. Jones, (1833) 1 Mac & G 668*n*.

[14] Cradock v. Piper, (1850) 1 Mac & G 664=1 Hall & Tw 617=19 L J Ch 107=14 Jur 97.

[15] Lincoln v. Windsor, (1851) 9 Hare 158=20 L J Ch 531=15 Jur 765.

[16] Manson v. Baillie, (1855) 2 Macq H L 80.

[17] Broughton v. Broughton, (1855) 5 De G M & G 160=25 L J Ch 250=1 Jur (N S) 965=3 W R 603.

in (1886) 34 Ch D 77[18] at pp. 82 and 83 pointed out that it had not been overruled, and in (1887) 34 Ch D 675[19] the Court of appeal, though it did not approve of the rule, held that it had been acted on so long that it must be considered a binding authority. Lindley, L. J. observed at p. 688 that although the rule ought not to be extended, it would not do to fritter it away. It has also been held that the rule does not apply to the case of a solicitor-trustee who acts for himself and co-trustees in respect of business done out of Court. The rule was commented on and distinguished in (1886) 33 Ch D 160.[20] It was followed in (1891) 2 Ch 363[21] and observed upon in (1893) 1 Ch 129.[22] It was not applied in the case of a solicitor who was the sole executor and trustee of a will in (1898) 1 Ch 297.[23] The rule has been called 'anomalous' by Lewin in his work on Trusts, Edn. 13, at p. 259. It has thus been criticised several times in England, but it is still the law, for the criticism is by Courts of co-ordinate jurisdiction, and the decision has not yet been overruled by the highest tribunal. It is still cited as good law by Halsbury in Vol. 28, para. 336, at pp. 63-64. In this connexion the observations of Herschell, C. in (1896) A C 44[24] at pp. 51-52, may be cited. That was a libel action arising out of a charge contained in a letter that the respondent, whilst holding the fiduciary position of vice-Chairman of the Council of the Yorkshire College, was making profit as its paid solicitor. Lord Herschell observes as follows (page 51) :

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.

The next question is whether the rule in *Cradock* v. *Piper*[14] is applicable in India. There is no case here in which it has been referred to, but it appears that in this very suit the applicants were allowed their profit costs by the Taxing Master in respect of a notice of motion which was dismissed against the defendants both in the Court below and in the Appeal Court. To adopt the test laid down by our Appeal Court in *Rege* v. *V. C. Vijayakar*,[10] the question is whether this rule of the English law is inconsistent with any law in India or any rule or practice of this Court. It was argued that the Indian Trusts Act was passed in 1881, and that if the Legislature was so minded, the rule in *Cradock* v. *Piper*[14] might have been engrafted as an exception to the general principle of S. 50. Counsel referred to Proviso 1 of S. 95 which allows a constructive trustee reasonable remuneration for his trouble, skill and loss of time if he rightfully cultivates the property in respect of which he is such trustee or if he employs it in trade or business. The argument is, however, open to the same criticism as S. 50, namely that the Act does not apply to public and charitable trusts. Moreover, it is not for this Court to say whether the rule in *Cradock* v. *Piper*[14] has been advisedly left out of the Act. It is really speaking a rule of taxation of costs, and I do not think such a rule, though it is referred to in legal decisions, would ordinarily be put into a statute which declares the general principles of the law. If S. 50 of our Act reproduces a principle of the English law, and the rule in *Cradock* v. *Piper*[14] is still applicable in England, it cannot be said to be repugnant to that principle. A solicitor-trustee is bound to protect the title to the trust property, and for that purpose defend a suit without remuneration; but he is under no obligation to do so in his professional capacity also for his co-trustees. In my opinion, therefore, the rule is not inconsistent with any law or rule of practice of this Court.

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[18] *In re* Barber ; Burgess v. Vinicome, (1886) 34 Ch D 77=56 L J Ch 216=55 L T 882=35 W R 326.

[19] *In re* Corsellis ; Lawton v. Elwes, (1887) 34 Ch D 675=56 L J Ch 294=56 L T 411=35 W R 309=51 J P 597.

[20] *In re* Corsellis ; Lawton v. Elwes, (1886) 33 Ch D 160=55 L J Ch 675.

[21] Stone v. Lickorish, (1891) 2 Ch 363=60 L J Ch 289=64 L T 79=39 W R 331.

[22] *In re* Doody ; Fisher v. Doody: Hibbert v. Lloyd, (1893) 1 Ch 129=62 L J Ch 14=2 R 166*n*=67 L T 650=41 W R 49.

[23] *In re* White ; Pennell v. Franklin, (1898) 1 Ch 297=67 L J Ch 139=77 L T 793=46 W R 247, *affirmed in* (1898) 2 Ch 217=67 L J Ch 502=78 L T 770=46 W R 676.

[24] Bray v. Ford, (1896) A C 44=65 L J Q B 213 =73 L T 609.

I have already held that the defendants were not strictly 'trustees'. It was argued that if the rule as to payment of costs was so strict against a trustee that it did not admit of any exception or extension except by deed or agreement, its application should also be restricted to those who were trustees in the strict legal sense of the term, and that the defendants not being trustees the applicants should get their full costs. But it has been held that this general rule applies to all persons standing in a fiduciary position, though they may not be strictly 'trustees', e. g. see *Bray* v. *Ford*,[24] referred to above. Whether therefore the defendants were managers of the charity properties in the position of trustees, for and on behalf of the community, as I have held, or whether they were trustees, either express or constructive in law, I do not see why the applicants should not get the advantage of the modification of the general rule of English law as to payment of costs, embodied in *Cradock* v. *Piper*.[14]

There is really no question of estoppel in this case, and the point has not been pressed. It appears, however, from the minutes of the resolutions passed by the community that Mr. Sabnis was willing in 1927 to resign on account of any embarrassment that may be caused to his co-trustees in the matter of his or his firm's costs by reason of his being a solicitor-trustee, and he continued to act when a resolution was passed that there was no legal objection to his acting as a member of the board and at the same time to his firm acting as the board's solicitors in the suit. It does not, therefore, seem quite fair on the part of his co-trustees, among whom there are some well-known lawyers, to take the full benefit of the applicants' services in a heavy litigation, and then seek to deprive them altogether of their profit costs on the ground that Mr. Sabnis was a solicitor-trustee. However, this is entirely beside the point. The parties could not agree to terms, and wished to stand on their rights according to the law.

In my opinion the applicants are entitled to their profit costs limited according to the rule laid down in *Cradock* v. *Piper*.[14] Where a solicitor-trustee is a defendant as trustee, and is held entitled to his costs, the Court directs them to be taxed as between attorney and client: *see* 1 Coll C C 260.[25] I therefore order that the judgment, order and certificate of the Officiating Taxing Master be set aside, and the applicants' bill of costs be taxed as between attorney and client, allowing them both out-of-pocket and profit costs except so far as such costs might have been incurred by Mr. Sabnis, solicitor, being a party defendant to the suit.

I have heard counsel on the question of costs both of the hearing before the Taxing Master as well as of the hearing before me in Court. I think the applicants are entitled to the costs of their appearance before the Taxing Master on the taxation of their bill of costs and on the hearing of the objections filed by them. I certify for counsel on the hearing beofre the Taxing Master. The Summons was first heard by Kania, J. who ordered it to be adjourned into Court and made the costs of the hearing costs in the Summons. On that counsel will be certified, if the learned Judge has not already said so in making his order.

With regard to the hearing before me I am satisfied that this was a matter of a somewhat complex nature which required consideration of the various principles and arguments advanced by counsel on either side. In my opinion this is a fit case in which I would allow the applicants' costs of the hearing to be taxed as on a long cause scale, allowing two counsel for the same. The applicants' costs, as ordered by me, will come out of the charity estate in the hands of the respondents. The respondents' costs of their appearance before the Taxing Master, on the same basis, and of the hearing before me, will also come out of the estate, taxed as between attorney and client.

K.B./A.L. *Application allowed.*

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[25] York v. Brown, (1844) 1 Coll C C 260=8 Jur 567.

A. I. R. 1937 Bombay 382

B. J. WADIA, J.

Varjivandas Jamnadas and *others* — **Plaintiffs.**

v.

Maganlal Chhabildas — **Defendant.**

O. C. Suit No. 1704 of 1930, Decided on 17th July 1936.

(a) Transfer of Property Act (1882), S. 3—Debt—Debt includes sum of money due to another actually payable at time or due afterwards — Amount due under policy is debt—It is attachable under S. 60, Civil P. C.

The amount due under a policy is a debt within the meaning of S. 3, T. P. Act; the term 'debt' includes a sum of money due by one person to another, which is actually payable at the time, or which is due though not actually payable then. The amount due under a policy is attachable under S. 60, Civil P. C., though it becomes payable only on the death of the assured: *13 Bom L R 590, Foll.* [P 383 C 2]

(b) Bombay High Court Rules (O. S.) (1936), R. 314—Execution — Appointment of Receiver — Previous attachment of property is not necessary.

It is not a condition precedent for the appointment of a Receiver that the property should be previously attached. If a decree-holder makes out proper grounds for equitable or indirect execution, namely by the appointment of a Receiver, such a Receiver can be appointed, for there is nothing in the Code or the rules which prohibits such an appointment. [P 383 C 2; P 384 C 1]

J. H. Vakeel — for Plaintiffs.

M. P. Amin — for Bai Kamla (the Assignee).

Judgment.— This is a Chamber Summons taken out by the plaintiffs for the appointment of a receiver in execution of two policies issued by the Oriental Government Security Life Assurance Co. Ltd., with power to him to recover the amount due under the policies and to give the company a discharge for the same.

A decree was passed against the defendant on 5th September 1930 in favour of the plaintiffs for a sum of Rs. 3,238-15-0 and interest thereon at 6 per cent. per annum till payment. In execution of the decree the plaintiffs attached the right, title and interest of the defendant in three policies of this company of Rs. 1,000 each. The defendant was the assured in respect of one of them, and with regard to the two others the defendant was the assignee of one Maneklal Chhaganlal. By an assignment dated 16th February 1932, the defendant purported to assign in favour of his wife, Bai Kamla, for a sum of Rs. 750 his right, title and interest in the two policies assigned to him by Maneklal Chhaganlal. The plaintiffs do not admit that the alleged assignment to Bai Kamla was for consideration. It is, however, in respect of these two policies that they have applied for a receiver in execution.

It has been held in 13 Bom L R 590[1] at p. 599 that the amount due under a policy is a debt within the meaning of S. 3, T. P. Act. The term 'debt' includes a sum of money due by one person to another, which is actually payable at the time, or which is due though not actually payable then. The amount due under a policy is attachable under S. 60 of the Code, though it becomes payable only on the death of the assured. The assured, viz. Maneklal Chhaganlal, died on 7th March 1936, and the amount due under the two policies became payable on the death. It is provided by R. 314 of the High Court Rules that an application for the execution of a decree by the appointment of a receiver to realize or otherwise deal with property under attachment shall be made to the Judge in Chambers. It was argued on behalf of Bai Kamla that the attachment was bad in law, because the moneys due under the policies were not payable before the death of the assured, and the assured was not dead at the date of the attachment, that in any event there is no attachment now subsisting, as it was levied in September 1930, and no alias warrant had been obtained after the expiry of a year as provided by R. 320. The question that arises is whether an attachment of property is always necessary for the appointment of a Receiver in execution. R. 314 deals with applications for the appointment of a Receiver in execution of a decree of a property under attachment, but I do not think it follows that no such Receiver can be appointed unless the property is under attachment. Under S. 51 of the Code, a decree may be executed by a sale without attachment of the property. It has been held by the Privy Council in 52 I A 262[2] that a receiver in execution can be appointed of "a right to future maintenance" within the meaning of S. 60 (1) (n) of the Code, though it cannot be attached and sold.

Counsel for Bai Kamla further contended that the procedure by way of Chamber Summons was wrong and that the plaintiffs should have taken out a garnishee notice under R. 329, after which he could have applied to the Court under the provisions of R. 332. It has however been held in 29 Bom L R 416[3] that a garnishee notice cannot issue unless and until the amount has become payable. All that the decree-holder can, therefore, do is to attach the debt payable to the assured which has been done. Counsel for Bai Kamla relied on 56 M L J 299,[4] but in that case the attachment of the amount due under the policy was never questioned. Even if it be held that the attachment is not subsisting, it is not, in my opinion, a condition precedent that the attachment should be subsisting for the appointment of a Receiver in execution. If a decree-holder makes out proper grounds for equitable or indirect execution, namely by the appointment of a Receiver, such a Receiver can be appointed, for there is nothing in the Code or the rules which prohibits such an appointment. The Receiver takes the place of the debtor and acts as an officer subject to the directions of the execution Court in collecting and disbursing the debtor's income in accordance with those directions towards the discharge of the claim of the decree-holder : *see* 52 I A 262.[2]

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[1] **Vishvanath v. Mulraj, (1911) 13 Bom L R 590=11 I C 964.**

[2] **Rajindra Narain Singh v. Sundar Bibi, A I R 1925 P C 176=87 I C 295=52 I A 262=47 All 385 (P C).**

[3] **Jetha Devji & Co. v. Durgadutt, A I R 1927 Bom 365=102 I C 418=29 Bom L R 416.**

Order. — Chamber Summons absolute. Court Receiver appointed Receiver in execution of the two policies mentioned in the summons. Costs costs in the execution. Counsel certified.

S.C./D.S. *Summons made absolute.*

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[4] G. D. John v. Sambamurthy Aiyar, A I R 1929 Mad 347=121 I C 155=56 M L J 299.

A. I. R. 1937 Bombay 384

KANIA, J.

Bhagirathibai and *others* — Plaintiffs.

v.

Advocate-General, Bombay — Defendant.

Suit No. 1599 of 1936, Decided on 20th November 1936.

Succession Act (1925), Ss. 142 and 150 — Scope — Testator bequeathing rent of one of his properties to his wife and daughters—Bequest held to be specific—Bequest held liable to abatement in proportion to fall of rent of property.

A testator stated in his will that the rent of a certain specific property of his was Rs. 1,000 and he further directed that out of that rent, each of his three daughters should receive Rs. 125 and his wife should get Rs. 125 and Rs. 500 should be paid to his wife or on her death to one of her daughters for family expenses. He further directed that if his wife and daughters lived separate, this latter sum of Rs. 500 should be divided equally amongst them :

Held : on construction that the bequest was a specific bequest and not a demonstrative one inasmuch as he was dealing with a specific property when he was dividing the rents of that property amongst the legatees mentioned in the will. The intention of the testator was not to give a bequest in any event and the rents of the property indicated a primary fund from which the bequest was to be given. The bequest was therefore liable to abatement in proportion to the fall of the rent of the property. [P 385 C 2]

Sir Jamshed Kanga — for Plaintiffs.

Murzban J. Mistree — for Defendant.

Order.—This Summons has been taken out by the plaintiffs to obtain directions from the Court for the administration of the estate ot the late Ramchandra Lalji who died in 1925 and the construction of his will dated 12th August 1924.

Question No. 1. — The first question is about the construction of clauses 4 and 7 of the will, relevant portions whereof run as under :

> 4. . . The average montly rent of my said Shaikh Memon Street property is about Rs. 1,000.
>
> 7. I direct my executors and trustees to pay out of the said monthly rents of my said Shaikh Memon Street property a sum of Rs. 125 to each of my three daughters and Rs. 125 to my wife Bhagirthibai every month for their respective lifetime and Rs. 500 every month to my wife and on my wife's death to my daughter Soonderbai for the family expenses for food, rent etc. of my wife and three daughters with their respective husbands or the survivors or survivor of them and if for any reason my three daughters and my wife live separately then the said amount is to be distributed equally amongst the four or the survivors or survivor of them.

On behalf of the plaintiffs it is urged that the legacies bequeathed by this clause in favour of the daughters and wife are demonstrative legacies. Under the will, the residue goes to charity and therefore the defendant, on the other hand submits that on a proper construction of the above clauses there is a specific bequest. S. 142, Succession Act, defines 'specific legacy' in the following terms :

> Where the testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Amongst the illustrations the following is relevant on this point : "(iv) *A* bequeaths to *B* . . . an annuity of 500 rupees out of the rents of his zamindari of W." This is a specific bequest. S. 150 of the said Act defines 'demonstrative legacy' in these terms :

> Where the testator bequeaths a certain sum of money, or a certain quantity of any other commodity and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation. — The distinction between a specific legacy and a demonstrative legacy consists in this, that—where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.

The relevant Illustration runs in these terms : *A* bequeaths to *B* an annuity and directs it to be paid "out of rents arising from my taluk of Ramnagar". This is a demonstrative legacy. In Williams on Executors (12th Edn.), Vol. 2, at p. 755 it is observed as follows :

> So a bequest of a rent out of a term of years is specific. Thus where the testator bequeathed 40*l*. a year to *A* for life, out of his chattel estate at Kenn, and 10*l*. a year to *B* for life, out of the same estate, which he gave to *C*, these several bequests were held specific: 1 P Wms 403[1].
>
> But if the testator's meaning is to give the legatee *an annuity at all events*, though he directs it to be paid *out* of an estate or the rents of it, the legacy is not specific but demonstrative: 2 Madd 223 ;[2] 6 H L C 885.[3]

The plaintiffs urge that according to the recognized canon of construction in case of doubt, a legacy should be construed as demonstrative rather than specific. They also rely on the decisions in 13 Bom L R 319[4] and 4 Ves 177.[5] The true test to determine whether a particular bequest is specific or demonstrative, so far as India is concerned, is mentioned in the Explanation to S. 150. For that, the only guiding factor can be the exact words used in the will and no other. While the authorities quoted decide the meaning of particular words used in a particular will, I do not think they are useful in determining the exact construction of the words used in this will. In the will before the Court, the testator started by saying that the average monthly rent of his property at Sheikh Memon Street was about Rs. 1,000 and in clause 7 directed a division of that rent amongst the persons mentioned in clause 7 of his will. The Court has therefore before it the mind of the testator working on the footing that he had this Sheikh Memon Street property. He knew what rents were realized therefrom and by clause 7 he was dividing the rents of that property amongst the legatees mentioned in the clause. Reading that clause as a whole, it seems to me that he was dealing with specific property belonging to him and the intention was not to give a bequest in any event and the rents of the property indicated a primary fund from which the bequest was to be given. The Illustration to S. 142, mentioned above, applies exactly to the facts here and supports the construction of the clause put by me. The decision in *Bai Bhicaji* v. *Bai Dinbai*[4] recognizes that in respect of rents of immoveable property, the question whether it is a specific legacy may arise, and the English decisions cited therein do not go against such disposal to be considered as specific bequests. In my opinion therefore the bequests contained in clause 7 of the will are specific bequests. The executors intimate that the rents have now come down to about Rs. 500. The result is that the bequests in favour of the parties mentioned therein shall abate to the extent of the abatement of the rent in fact, as compared to Rs. 1,000, which was the basis of the bequest. My answer to this question is therefore in the negative. Costs of both parties, as between attorney and client, to come out of the estate.

W.D./A.L. *Answer accordingly.*

A. I. R. 1937 Bombay 385

BEAUMONT, C. J. AND N. J. WADIA, J.

Harilal Gordhan — Accused
Applicant.
v.
Emperor.

Criminal Revn. Appln. No. 3 of 1937, Decided on 25th February 1937, from conviction and sentence passed by City Magistrate, First Class, Ahmedabad.

(a) Gambling — Evidence—Corroboration—Evidence of police agent must always be corroborated—Evidence of panch accompanying police agent is not sufficient to corroborate evidence of police agent.

In many gambling cases police agents are not only accomplices but are also unreliable witnesses, because they are generally paid by results. It is always in their interest to secure a conviction in the hope of getting a part of the fine which may be imposed. The evidence of a police agent in these cases must always be corroborated before it can be acted upon. The evidence of the panch accompanying the police agent in such cases is not enough to corroborate the evidence of the police agent.

[P 386 C 1, 2]

(b) Evidence Act (1872), S. 45—Gambling is not art or science.

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1. Long v. Short, (1717) 1 P Wms 403=2 Vern 756=24 E R 445.
2. Mann v. Copland, (1817) 2 Madd 223=56 E R 317.
3. Vickers v. Pound, (1858) 6 H L C 885=28 L J Ch 16=4 Jur (N S) 543=6 W R 580.
4. Bai Bhicaji v. Bai Dinabai, (1911) 13 Bom L R 319=11 I C 350.
5. Richardson v. Brown, (1798) 4 Ves 177.

It is impossible to say that gambling is either an art or science within the meaning of S. 45, Evidence Act. [P 386 C 2]

(c) Evidence Act (1872), S. 49 — Scope— Satta gambling—Unintelligible slips found in possession of accused– Police officer cannot merely give his opinion upon their meaning unless he gives evidence of his long experience amongst such people supported by instances.

A police officer is not merely entitled to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. But under S. 49, Evidence Act, a police officer might give evidence that he had had a long experience amongst people who indulged in satta gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion which would be relevant under the section that the slips in question were prepared in accordance with that system or code and had a certain meaning. [P 386 C 2; P 387 C 1]

K. D. Thakor and *V. N. Chhatrapati* — for Applicant.

P. B. Shingne — for the Crown.

Beaumont, C. J.—This is an application in revision in which the accused complain of their convictions by the City Magistrate, First Class, Ahmedabad, under S. 5, Bombay Prevention of Gambling Act, 4 of 1887. The convictions were upheld by the Sessions Judge of Ahmedabad, and the question is whether on the evidence the convictions can be supported. The case was tried summarily, and therefore we have no record of the exact evidence given. We have only the statement of the evidence recorded in the judgment of the trial Court, and to some extent in that of the appellate Court. It appears that a police agent (usually referred to as a punter) was given a marked five rupee currency note, and he and a companion went to the place of the accused, and, according to them, handed over the marked currency note as a bet on Ahmedabad 5. On the premises of the accused being raided, the marked currency note was found with accused 1. These gambling cases no doubt present difficulties. People who indulge in gambling naturally endeavour to conceal the true nature of their operations, and it is difficult for the police to prove their case. But at the same time, a charge of gambling like any other criminal charge must be proved by the prosecution by proper evidence, and one cannot fail to note that a false charge of gambling is one very easy to frame. I have said in a great many of these cases that these police agents are not only accomplices, but are also unreliable witnesses, because they are generally paid by results. It is always in their interest to secure a conviction in the hope of getting a part of the fine which may be imposed. The evidence of a police agent in these cases must always be corroborated before it can be acted upon. I do not think that the case is improved by providing the police agent with a companion and calling him a panch, as was done in this case. The finding of the marked currency note is not by itself sufficient to justify the convictions.

The other evidence against the accused is the alleged finding on their premises of instruments of gaming, which consisted of certain slips. Those slips have now been translated, and they are by themselves quite unintelligible. They certainly do not purport to be records of gambling transactions. It appears, however, that the Police Sub-Inspector went into the witness-box and stated that in his view, based on experience in other cases, these slips were instruments of gaming. He suggested apparently that slip B should be construed in such a way that the first entry, which is Rs. 20 of Kaku, amounts to the record of a bet of Rs 2 on mandi by a man named Kaku, though there is nothing whatever in the slip itself to suggest that that is its meaning. In point of fact, it is not the prosecution case that a man named Kaku made a bet of Rs. 2, and prima facie a mandi transaction is not a gambling transaction. So that the particular instance, which the Sub-Inspector gives as to how one slip should be construed, does not appear to support the prosecution. But the question arises how far a police officer is entitled to go into the box and speak as an expert as to the way in which apparently harmless documents should be interpreted. In my opinion it is impossible to say that gambling is either an art or science within the meaning of S. 45, Evidence Act. I think that the only section under which evidence of this nature might in a proper case be admitted is S. 49, which provides so far as it is material:

> When the Court has to form an opinion as to the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon, are relevant facts.

It may be that under that section a police officer might give evidence that he had had a long experience amongst people who indulged in satta gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But the Sub-Inspector in this case does not appear to have done anything of this sort. He is not entitled merely to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents mean, and opinion on the matter can only be relevant if made so by the Legislature. In my opinion the convictions were not justified on the evidence. The application therefore must be allowed, the convictions set aside, and the fines repaid.

N. J. Wadia, J.—I agree.

K.B./A.L. *Application allowed.*

A. I. R. 1937 Bombay 387

BEAUMONT, C. J. AND BLACKWELL, J.

Ramgopal Ramrikh Pandya and *others* — Plaintiffs — Appellants.

v.

Firm Tarachand-Ghanshyamdas and *others* — Defendants — Respondents.

Appeal No. 38 of 1936, Decided on 3rd March 1937, from the judgment of Divatia, J., in Suit No. 389 of 1933, D/- 16th June 1936.

Letters Patent (Bombay), Cl. 12—'Carrying on business'—Firm *T* of Calcutta consisting of eleven members carrying on business at Karachi in partnership with firm *M* of Bombay and at Bombay in partnership with twelfth partner—Deed of composition by *M* firm assigning their interest in firm *T* at Karachi to trustees — Suit by trustees in Bombay High Court for dissolution and accounts of firm *T* of Karachi—Plaint describing defendant as 'Messrs. *T* Firm carrying on business at Bombay, Karachi and Calcutta'—Defendants held were eleven partners of firm *T* at Calcutta and carried on business at Bombay though in partnership with twelfth member—Bombay High Court held had jurisdiction to entertain suit.

Clause 12, Letters Patent (Bombay), is not confined to carrying on business alone. It is a fallacy to say that a partner in a firm does not, but the firm does, carry on business: *Sadler* v. *Whiteman*, (1910) *1 K B 868, Rel. on.* [P 388 C 1, 2]

A firm named *T* of Calcutta consisting of eleven partners carried on business under the same name and style *T* at Karachi in partnership with another firm *M* of Bombay; and at Bombay in partnership with a twelfth partner. The firm *M* came into difficulties and thereupon the members of that firm entered into a composition deed and assigned all their properties in the firm together with their share and interest in the partnership in the firm *T* at Karachi to the trustees named in the deed. The trustees brought a suit in the Bombay High Court for dissolution and accounts of *T* firm of Karachi and in the plaint described the defendant as 'Messrs. *T*, a firm carrying on business at Bombay and also at Karachi and Calcutta'. The contention of the defendants was that the firm in Bombay named *T* was different from firm *T* at Calcutta which had entered into suit partnership with firm *M* and hence Bombay High Court had no jurisdiction to entertain the suit:

Held: that from the description of the defendants in the plaint, the defendants were the eleven individuals carrying on business under the name of *T* at Calcutta. These eleven persons did carry on business in Bombay and none the less so because they carried on business in partnership with a twelfth individual. Hence Bombay High Court had jurisdiction to entertain the suit. [P 388 C 1, 2]

F. J. Coltman and *D. B. Desai* — for Appellants.

J. H. Vakeel and *M. P. Amin* — for Respondent 1.

Beaumont, C. J.—This is an appeal from a judgment of Divatia, J. in which he held that the Court had no jurisdiction to try the suit on the ground that defendants 1 did not dwell or carry on business or personally work for gain within the limits of this Court's original jurisdiction. The plaintiffs are eight of the trustees of a deed of composition executed by a firm of Mamraj Rambhagat. The other two trustees are defendants 2 and 3, both of whom reside in Bombay. Defendants 1 are described in these terms:

> Messrs. Tarachand Ghanshyamdas, a firm carrying on business at Shaikh Memon Street, outside the Fort of Bombay and also at Karachi and Calcutta.

The plaintiffs allege that the firm of Mamraj Rambhagat was a partner with defendant 1 firm of Tarachand Ghanshyamdas, and they ask for accounts of the partnership. It is clear from an affidavit made by the plaintiffs on a motion in the suit that originally they thought that the firm of Tarachand Ghanshyamdas was one firm which carried on business at three places—Bombay, Karachi and Calcutta. But it appears from an affidavit made by the defendants on the motion—and the fact is not now disputed by the plaintiffs—that there are in fact three firms carrying on business under the name of Tarachand Ghanshyamdas. The first firm consists of eleven individuals and carries on business at Calcutta; the second firm consists of those same eleven individuals and Mamraj Rambhagat and carries on business at Karachi; and the third firm consists of the same eleven individuals and defendant 2, though he is sued in another capacity, and that firm carries on business in Bombay. Now, having regard to those facts, when one looks at the description of defendants 1, it is apparent that it must cover only the Calcutta firm of eleven persons, because that is the only firm of Tarachand Ghanshyamdas which carries on business at the three places named, since it carries on business at Calcutta alone, and at the other two places in partnership. So that, I have no hesitation in holding (and that is the first point we have to decide) that defendants 1 are the eleven individuals carrying on business under the name of Tarachand Ghanshyamdas at Calcutta; and it is clear from para. 1 of defendant 1's written statement that they so understood the plaint, because they say:

> These defendants state that they do not carry on business in Bombay and state that they carry on business in Calcutta.

So that, it was realized by defendants 1 that the people sued were people carrying on business at Calcutta. The learned Judge held that there being three firms, and the Bombay firm being distinct from the Calcutta firm, this Court had no jurisdiction to entertain the suit. But in that it appears to me that he is clearly wrong. Cl. 12, Letters Patent, confers jurisdiction on this Court if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within the local limits of the Court's jurisdiction. It seems to me quite plain that the eleven persons do carry on business in Bombay, and none the less so because they carry on business in partnership with a twelfth individual. Cl. 12 is not confined to carrying on business alone; and, as was pointed out by Farwell, L. J. in the English case in (1910) 1 K B 868,[1] at p. 889, a case which dealt with the expression "carrying on business" as used in the English Moneylenders Act: "It is a fallacy to say that a partner in a firm does not, but the firm does, carry on business." I think that view is correct; and here, undoubtedly, the eleven individuals, who are comprised in the firm name used to describe defendants 1, do carry on business in Bombay, though in partnership with another individual. That being so, I think the learned Judge was wrong in holding that the Court had no jurisdiction to entertain the suit. The appeal must be allowed with costs, and the suit remanded to the lower Court for trial on the merits. Costs of the suit in the lower Court to be dealt with by the learned Judge trying the suit on merits.

Blackwell, J.—I agree.

P.R./D.S. *Suit remanded.*

A. I. R. 1937 Bombay 388

BEAUMONT, C. J. AND N. J. WADIA, J.

In re *Anandi Mahar* — Applicant.

Criminal Revn. Appln. No. 386 of 1936, Decided on 11th February 1937, against order of Dist. Magistrate, Poona.

(a) Bombay Children Act (13 of 1924), S. 7 —Putative father cannot start proceedings under S. 7.

Under S. 7, Bombay Children Act, the only persons who can move the Court are a police-officer or other person authorized in this behalf in accordance with rules made by the Governor in Council. Those persons include Probation Officers and certain other persons, but not an alleged putative father. A putative father has therefore no locus standi to start proceedings under S. 7 of the Act. [P 389 C 1]

(b) Bombay Children Act (13 of 1924), S. 51 —Scope—Order by District Magistrate in appeal from order under S. 7—S. 51 (3) does not apply to such order—High Court can revise such order.

Section 51 (3), Bombay Children Act, is an enabling section and not a disabling section. The powers of revision under S. 51 (3) are conferred by statute and it cannot be said that they have been limited by implication in the absence of any express words thereto. S. 51 (3) does not in terms apply to an order passed by a District Magistrate on appeal against the order made under S. 7 of the Act. The High Court can therefore revise such order in revision. [P 389 C 2]

T. M. Guido and *Joachim Alva* — for Applicant.

G. C. O'Gorman, C. B. Agarwal and *B. G. Thakor* — for Opposite Party.

Beaumont, C. J.—This is an application in revision against an order made by the

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[1] Sadler v. Whiteman, (1910) 1 K B 868=79 L J K B 786.

District Magistrate of Poona under the Bombay Children Act, 1924. It appears that the original applicant, who alleges that he is the father of the three children of the respondent, Anandi, but who failed to prove that fact, instituted proceedings under S. 7, Bombay Children Act, and on those proceedings the Magistrate made an order directing that the three children should be placed under the care of Revd. Mother Superior of the Mount Mary Convent High School, Bandra, for a period of three years, and the mother was to pay the boarding and other fees. Then the mother's right of access was restricted by the order which states that

> the children should be continually under the care of the Revd. Mother and not allowed to go home for their holidays. But their mother only may be permitted to visit them and correspond with them according to the rules of the Convent. All letters addressed to them or by them should pass through the hands of the Revd. Mother.

The mother did not object to that order and she does not now object to it, but the applicant appealed from that order to the District Magistrate. Whether a person, who alleges, but fails to prove, that he is the father of a child, has any locus standi to appeal, may be a question. In point of fact, the whole proceedings seem to me to have been somewhat irregular.

Under S. 7 of the Act, the only persons who can move the Court are a police-officer or other person authorized in this behalf in accordance with rules made by the Governor in Council. Those persons include Probation Officers and certain other persons, but not an alleged putative father. So that, strictly speaking, the applicant had no locus standi in the first instance. However, the Court does seem to have asked the Probation Officer to make certain enquiries. It may be therefore that the Court having knowledge of the condition of these children induced the Probation Officer to take action under S. 7, in which case the proceedings would be regular.

In appeal, the District Magistrate upheld the order except in this respect that he limited the visits of the mother to not more than two per year, and the mother applies in revision from that order because she objects to that limitation.

The first point taken by the respondent is that no revision application lies under S. 51 of the Act. That section provides that against certain orders an appeal may be brought to a District Magistrate, and it also provides that: "No appeal shall lie from any order passed in any such appeal".

Sub-section (3) of that section provides that:

> Any order passed under the provisions of this Act and not subject to appeal under sub-s. (1), may be revised by the High Court.

The order sought to be revised in this case is the order of the District Magistrate made in appeal, which is not subject to appeal under sub-s. (1). So that, strictly speaking, sub-s. (3) does not seem to apply to an application to revise this particular order. In any case, however, sub-s. (3) is in terms an enabling section and not a disabling section, and if it purports to restrict in any way the High Court's powers of revision, it does so only by implication. As those powers of revision are conferred by statute, it would be wrong to hold that they have been limited by implication when they have not been limited by any express words. I think, therefore, that we have power to deal with the matter in revision. (After discussing evidence the judgment concluded.) I think that the proper order in this case is to set aside the order of the District Magistrate and to restore the order of the trial Court.

N. J. Wadia, J.—I agree.

K.B./A.L. *Order set aside.*

A. I. R. 1937 Bombay 389

N. J. WADIA AND DIVATIA, JJ.

Annu Bhujanga Chigare — Appellant.

v.

Rama Bhujanga Chigare—Respondent.

First Appeal No. 313 of 1934, Decided on 13th January 1937, from decision of Dist. Judge, Belgaum, in Letters of Administration No. 9 of 1933.

Succession Act (1925), S. 63 — 'Sign' — Interpretation — Will is validly attested if illiterate attesting witness makes his mark or thumb impression.

The definition of the word 'sign' in S. 3, General Clauses Act, does apply to the word 'sign' in S. 63 (c), Succession Act, and that word in S. 63 (c) is to be interpreted in the light of its definition in the General Clauses Act in view of S. 4 of that Act. A will is therefore validly attested if an illiterate attesting witness makes his mark or thumb impression on it: *A I R 1936 All 576 (F B)* and *A I R 1935 Mad 178, Foll.*; *11 Cal 429* and *3 Bom 382*, *Disting.* [P 391 C 2; P 392 C 1]

K. G. Datar — for Appellant.

B. D. Belvi — for Respondent.

Divatia, J. — This appeal arises under the Succession Act of 1925 and is preferred by the opponent in an application for letters of administration to the estate of one Bhujanga who made a will dated 30th May 1932, in the petitioner's favour. The opponent who is the petitioner's brother contends that the will is not valid inasmuch as the two attesting witnesses had not signed their names but had only made their thumb impressions, and therefore the provisions of S. 63, Cl. (c), Succession Act of 1925, were not fulfilled. According to him, it was necessary under that section that each of the attesting witnesses shall sign in the presence of the testator, which means that he must put down his name in his handwriting and not merely affix his mark or thumb impression. The learned Judge has not accepted this contention and has held that the word 'sign' includes the making of a mark, in the case of a person unable to write his name, as defined in the General Clauses Act of 1897. The definition of the word 'sign' there is as follows :

> 'Sign' with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark', with its grammatical variations and cognate expressions.

The learned Judge was of the opinion that this Act was enacted in 1897 and under S. 4 thereof, the definition of 'sign' applies to all Acts of the Governor-General in Council and Regulations made on or after the 14th day of January 1887 unless there is anything repugnant in the subject or context. The Succession Act of 1925 was enacted after 1887 though the previous Succession Act of 1865 was before that year and on that ground the learned Judge distinguished the case relied upon on behalf of the opponent, viz. 11 Cal 429,[1] which laid down that under S. 50 of the old Succession Act, which is similar to S. 63 of the present Act, it was necessary that the attestors should sign their names and not merely put their marks thereon. He therefore held that the word 'sign' in the present Succession Act was governed by the definition of that term in the General Clauses Act with the result that the attestation of the will was valid and that the will was proved. The present appeal is preferred by the opponent against the order to issue letters of administration. Two arguments have been urged on behalf of the appellant before us. The first argument is that this deed is not a will because it is stated in one of the clauses thereof that the testator had given certain land that day to the petitioner to be enjoyed from generation to generation and that as it was meant that the deed was to come into operation on that very day and not after his death, the document was not a will. There is no substance in this argument. What the testator meant was that by this document which he was executing on that day he had given that land to the petitioner, and the document read as a whole clearly shows that it was a will and was to come into operation after his death.

The second argument is the same as was urged in the lower Court, and the learned advocate on behalf of the appellant has relied upon the decision in *Nitye Gopal* v. *Nagendra Nath*,[1] quoted by the lower Court in its judgment, and also a similar decision of our High Court in 3 Bom 382.[2] The gist of this argument is that there is a difference between the wording of Cls. (a) and (b) of S. 63 and Cl. (c) thereof. In Cls. (a) and (b), with reference to the testator, it is provided that the testator shall sign or shall affix his mark to the will, while in Cl. (c) it is stated that each of the attesting witnesses shall sign the will in the presence of the testator, and the argument is that the Legislature wanted to make a distinction between signing and merely making a mark. Otherwise, the difference of phraseology could not be explained. It is true that both the decisions relied upon on behalf of the appellant support this contention: But both of them were before the present General Clauses Act which gives the definition of 'sign' as including the making of a mark in the case of illiterate persons while the previous General Clauses Act did not contain any definition of the word 'sign'. Under S. 4 of this Act, this definition would apply to that word occurring in all the enactments of the Governor-General in Council from the year 1887, unless there is anything repugnant in the subject or context. The question therefore is, whether there is such repugnance in the subject or context as would make the definition of the word 'sign' inapplicable to that word occurring in S. 63 of the present Succession Act. There is a very recent Full Bench decision of the Allahabad High Court on this point in A I R 1936 All 576.[3] It is held in that case that a will is validly attested within the provisions of S. 63, Succession Act, if the attesting witnesses have merely affixed their mark to the will. The Court was of opinion that S. 63, Succession Act, was drafted in a careless manner and the ambiguity arose from such careless draftsmanship, and that of the two possible interpretations, it was more in consonance with reason, common sense and convenience that the word 'sign' should include not only the signature containing the name but also a mark of the person attesting if he is illiterate, and one of the reasons given for preferring this view is that in England attestation can also be made by a person by affixing his mark. Much more so should it be in India, where a large majority of persons in villages is illiterate.

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[1] Nitye Gopal v. Nagendra Nath, (1885) 11 Cal 429.

[2] D. Fernandez v. R. Alives, (1878) 3 Bom 382.

There is another recent decision of the Madras High Court in 58 Mad 220.[4] There the same point has been discussed though not with reference to S. 63, Succession Act, but to the definition of the word 'attest' occurring in S. 3 of the present Transfer of Property Act. The provisions in both these sections are the same and therefore the reasoning in the Madras case would apply also to a case falling under S. 63 of the present Succession Act. There also, the Court held that the word 'sign' used in S. 3, T. P. Act, with reference to an attesting witness, must be taken to be governed by the definition of that word in S. 3, Cl. (52), General Clauses Act of 1897, and to include a mark with reference to a person who is unable to write his name. This view has been followed in the Allahabad Full Bench decision.

After considering the arguments for and against the two different constructions to be put upon the word 'sign', it appears to us that the decisions of the Madras and Allahabad High Courts are correct. The definition in the General Clauses Act of 1897 does apply to the word 'sign' in S. 63 of the present Succession Act. It is probable that the Legislature, when it retained S. 50 of the old Succession Act, in S. 63 of the present Succession Act, had in mind the two decisions of the Bombay and the Calcutta High Courts quoted above as also the definition of 'sign' in the present General Clauses Act; but still it did not make any change in the wording of the section. It seems to us that the reason why no such change was made is not that the Legislature meant that these two decisions should remain good law even after the word 'sign' was defined in the General Clauses Act on the ground that that definition was repugnant to the context with reference to S. 63, but that no change was necessary because the word 'sign' was meant to be used in that section as defined in the General Clauses Act, and that a clear distinction was intended between the acts of a testator and an attestor. The reason for making that distinction seems to be well founded. The Legislature wanted to make it clear that a testator, even though literate, should be allowed to execute a valid will by making his mark only as he might be physically very weak to write his name. Even if he is unable to make his mark, when, for example, his hands are incapacitated, it is further provided that the will may be signed by some other person in his presence and by his direction. Under its definition in the General Clauses Act, the word 'sign' does not include the making of a mark in the case of a literate person and it was therefore necessary to add the words 'or shall affix his mark' in the case of a testator, while in the case of an attestor this addition was not necessary as it was meant to be provided that a mark was to be made only by a person who is unable to write his name, i. e., illiterate, and that in his case, the word 'sign' as defined in the General Clauses Act would be sufficient as it would include a mark by an illiterate person.

On this view it is not necessary to ascribe careless draftsmanship to the Legislature as has been done in the abovementioned Allahabad decision. But even assuming that this view is not correct, we agree with that decision that the word 'sign' in S. 63 should be interpreted in the light of its definition in the General Clauses Act, and that there is no repugnancy in the context. The main purpose of attestation is that the attestor should be present and should be assured of what be sees or what the executant acknowledges before him about his execution of the document and that can be recorded by an illiterate attestor making his mark or thumb impression on it. The two cases, *D. Fernandez* v. *R. Alives*[2] and *Nitye Gopal* v. *Nagendra Nath*,[1] could be distinguished on the ground that there was no definition of the word 'sign' in the General Clauses Act then in force while in the present Act there is a definition which applies to the present Succession Act. The order of the lower Court is confirmed and the appeal is dismissed with costs.

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[3] Maikoo Lal v. Santoo, A I R 1936 All 576 = 164 I C 298 = 1936 A L J 782 = 58 All 1064 (F B).

[4] Nagamma v. Venkatramayya, A I R 1935 Mad 178 = 154 I C 777 = 58 Mad 220 = 68 M L J 191.

N. J. Wadia, J.—I agree.

K.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Bombay 392

B. J. WADIA, J.

Freny Barjorji Engineer — Plaintiff.

v.

Shapurji Kekobad Modi — Defendant.

Suit No. 1558 of 1934, Decided on 17th January 1936.

(a) Parsi Marriage and Divorce Act (1865), S. 3 — Scope — Contract of marriage — Party to such contract above 18 years can sue for damages for breach of contract of marriage even though below 21 years.

Amongst Parsis, there is a statutory impediment to marriage contained in S. 3, Parsi Marriage and Divorce Act until the parties attain the age of 21, but that impediment must be strictly confined to the purpose for which it was intended. It is an impediment which interferes with the freedom of contracting of parties who are otherwise competent to contract after attaining the age of 18, and it cannot be extended further to prevent a person who is above 18 years from enforcing his rights under the contract. [P 394 C 2]

Where therefore the mother of a minor girl enters into a contract of marriage on behalf of the minor and for her benefit and on the failure of the contract the girl sues through her mother as her next friend for damages for breach of contract of marriage, and on attaining 18 years, she continues the suit in her own name, discharging the guardian, she can do so in her own right, even though she has not attained the age of 21 years as laid down in S. 3 of the Act: *A I R 1925 Bom 97*, *Rel. on*; *32 All 410* (*P C*), *Ref.* [P 394 C 2]

(b) Majority Act (9 of 1875), S. 2 — Promise to marry is not act in matter of marriage within S. 2.

A promise to marry is not strictly speaking an act in the matter of marriage within the meaning of S. 2, Majority Act. The capacity to act in the matter of marriage must be confined to the marriage itself and acts arising out of the marriage but not to the betrothal which precedes it: *22 Bom 430*, *Rel. on.* [P 394 C 1]

J. S. Khergamvala and *P. B. Vachha*—for **Plaintiff.**

J. H. Vakeel and *N. K. Aiyangar* — **for Defendant.**

Judgment.—Plaintiff has filed this suit against the defendant to recover a sum of Rs. 10,000 or such other sum as to the Court may seem adequate for damages for breach of promise of marriage, and a further sum of Rs. 426 for moneys spent and expenses incurred at the time of her betrothal with the defendant and subsequent thereto. Plaintiff was engaged to be married to the defendant on or about 21st March 1934, when she was about 17 years old, and the suit was originally filed by her through her mother as next friend. Thereafter she attained the age of 18, and the next friend was discharged and the plaint was re-declared by the plaintiff personally. Defendant denies liability on the ground that the agreement of marriage is void and unenforceable in law, as the plaintiff was admittedly a minor at the date of that agreement. He denies liability also on the ground that his consent to the agreement was obtained by certain false and fraudulent representations alleged by him in his written statement, and on the ground of the plaintiff's misconduct.

At the hearing certain issues were raised on behalf of the defendant of which the first two issues were argued as preliminary issues. They are (1) whether the agreement referred to in the plaint is void and unenforceable, and (2) whether in any event the plaintiff can maintain this suit. It was argued by defendant's counsel that the agreement of marriage was between the plaintiff and the defendant, and that the agreement cannot be enforced by the plaintiff as it has been authoritatively held by the Privy Council in 30 Cal 539,[1] that a minor's contract is altogether void and not merely voidable at the minor's instance as was previously held by the various High Courts of India following the English law. It is a contract on which no action can lie and which cannot be subsequently ratified. To that, the plaintiff's answer is that the contract of marriage was really made by the minor's mother as the natural guardian of the plaintiff on her behalf, that the guardian has power to enter into a contract on behalf of the minor so as to bind the minor, that the contract is for the benefit of the minor, and that under the circumstances it is enforceable by the minor herself. This is not quite clearly alleged in para. 1 of the plaint where it is stated that the plaintiff was duly engaged to be married according to the rites and ceremonies of the Parsi religion and customs. That might mean either that the plaintiff herself entered into the agreement, or that the agreement was made on her behalf by some one else with the defendant. The plaintiff's counsel applied for an amendment of para. 1 of the plaint in order to have it made clear that the plaintiff was engaged to be married to the defendant at the instance of the plaintiff's mother who made the necessary arrangements, and to make all consequential amendments in the plaint. Defendant's counsel does not object to such an amendment, and I therefore allow it; the amendment to be made at the plaintiff's own cost. Evidence, however, will have to be led on behalf of the plaintiff to prove that she was engaged to be married to the defendant at the instance of her mother in terms of the amended plaint.

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[1] Mohori Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114=8 Sar 374 (P C).

My attention was drawn to the case in 48 Bom 673,[2] that a minor can maintain a suit for breach of promise of marriage, if the contract is made by the minor's guardian on her behalf and is for the minor's benefit. In that case, the parties were Roman Catholics, the plaintiff being a Goan and the defendant an East Indian. The learned Judge who tried the case came to his conclusion on a consideration of the customs and manners in this country, and the duties of parents as understood in the particular community in question, and he held that the contract of marriage was enforceable by the minor, though it had been made on the minor's behalf by her guardian. It was pointed out that the Goans and East Indians were originally converted from Hinduism to Christianity, but that they still followed the customs, manners and habits of their Hindu ancestors amongst whom marriage is considered to be the primary duty of parents, especially in the case of girls. He has expressed his opinion that the Indian Christians and Goans must be considered to be on the same footing as Hindus or Mahomedans and other communities in India, and I see no reason why amongst Parsis also such a contract, if it is proved to have been entered into by the guardian of the minor and is for the minor's benefit, should not be held to be enforceable at law. In fact, under S. 3, Parsi Marriage and Divorce Act of 1865, one of the requisites to the validity of a Parsi marriage is that, if the bridegroom or the bride is below the age of twenty-one, the consent of his or her father or guardian shall have been previously given to the marriage. It is therefore clear that even amongst Parsis, parents are deemed to have a controlling hand in the matter of their children's marriage, and the consent of the father or guardian is necessary until the boy or the girl has completed the age of twenty-one years. I may also in this connexion refer to the judgment of the Privy Council in 37 I A 152,[3] where it is stated as follows (p. 159):

> Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts.

The common law doctrine there referred to is the one laid down in the leading case in 1 B & S 393,[4] that a stranger to the consideration of a promise cannot maintain a suit on the contract. It has been held that under the English law a third party cannot sue on a contract made between two other parties even though made for his benefit, unless he was in the position of a cestui que trust under the fiction of a trust which made one of the real contracting parties a trustee for him. The case of *Tweddle* v. *Atkinson*,[4] however, is not an authority in India. Plaintiff's counsel also applied *ex majori cautela* to have the plaint amended by adding the plaintiff's mother as a co-plaintiff with her, the mother being willing and consenting to be added as such. The application is made under the terms of O. 1, R. 10 (1), Civil P. C., under which it is provided that where it is doubtful whether the suit has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just. I would have allowed this amendment if I thought that it was necessary to add the mother as co-plaintiff for the determination of the matters in dispute between the parties, but I do not think that it is strictly necessary, especially in view of the fact that the plaintiff has now attained majority. In any event, the suit cannot be bad on the ground of non-joinder, and adding the mother as co-plaintiff, if necessary, would not in my opinion alter the nature of the cause of action. I hold that the agreement is enforceable in law, and by the plaintiff.

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[2] Rose Fernandes v. Joseph Gonsalves, A I R 1925 Bom 97=85 I C 587=48 Bom 673 = 26 Bom L R 1035.

[3] Khwaja Muhammad Khan v. Husaini Begam, (1910) 32 All 410=7 I C 237=37 IA 152 (PC).

[4] Tweddle v. Atkinson, (1861) 1 B & S 393.

The next question is whether the suit as framed can be maintained. The plaintiff is admittedly eighteen years old and below twenty-one. It is provided by S. 2 (a), Indian Majority Act, that nothing in that Act which fixes the age of majority at eighteen shall affect the capacity of any person to act in the following matters, viz marriage, dower, divorce and adoption. It has been held that the age of majority amongst Parsis for the purposes of the Parsi Marriage and Divorce Act is twenty-one, *see* 18 Bom 366,[5] in which the Court ordered in a suit filed by the husband for divorce against his wife who was below the age of twenty-one that she should be represented by a guardian ad litem. The question for consideration is whether, if a Parsi boy or girl is not of the statutory age of majority for the purposes of the marriage, he or she can enter into an agreement to marry. I do not think that a promise to marry is strictly speaking an act in the matter of marriage within the meaning of S. 2, Indian Majority Act. The capacity to act in the matter of marriage must be confined to the marriage itself and acts arising out of the marriage, as in 22 Bom 430,[6] but not to the betrothal which precedes it. It was argued that a betrothal was the first step in the marriage, and if a Parsi could not legally marry till twenty-one, how could he or she be betrothed for the purpose of marriage before that age? **Betrothal is generally the first step towards a solemnization of the marriage, but it is not an essential part of the marriage, and is entirely independent of the marriage. Two Parsis over the age of twenty-one, and with the consent of the father or guardian when below the age of twenty-one, can get married without any betrothal at all.** The effects of the two transactions are also different. The promise to marry is revocable; marriage is irrevocable, except that the law allows divorce or dissolution on certain restricted grounds. Amongst Parsis there is no doubt a statutory impediment to marriage contained in S. 3, Parsi Marriage and Divorce Act, until the parties attain the age of twenty-one, but in my opinion that impediment must be strictly confined to the purpose for which it was intended. It is an impediment which interferes with the freedom of contracting of parties who are otherwise competent to contract after attaining the age of eighteen, and I do not see why that impediment should be extended further.

In my opinion, therefore, the agreement of marriage is enforceable by the plaintiff. It was made on her behalf and for her benefit by her mother when she was below the age of eighteen, and having attained that age after the filing of the suit, the next friend is properly discharged, and she can maintain the suit in her own right. It was lastly argued that the suit was not maintainable by the plaintiff, even though the contract was entered into by her mother for her personal benefit, as no claim to property was involved. It is true that the cases that are referred to are generally cases in which such claims are involved, but it does not necessarily follow that the benefit should be proprietary only. A personal benefit in the form of a good and valid marriage is as good a benefit as any other benefit involving a claim to property. I will answer both the issues 1 and 2 after recording the evidence. I order that the suit must now proceed on the merits. (The suit ended in a consent decree on 13th February 1936, whereby the defendant agreed to pay to the plaintiff a sum of Rs. 2,500 in full settlement of her claim).

K.B./A.L. *Suit partly decreed.*

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[5] Sorabji Cawasji v. Buchoobai, (1894) 18 Bom 366.

[6] Bai Shirinbai v. Kharshedji, (1896) 22 Bom 430.

A. I. R. 1937 Bombay 395

KANIA, J.

Fakir Mahomed Malang—Applicant.

v.

Municipal Commissioner of Bombay—Opposite Party.

Misc. Petition No. 58 of 1936, Decided on 3rd July 1936.

Bombay City Municipal Act (3 of 1888), S. 411—Scope—Commissioner has discretion under S. 411 to refuse license to butcher to carry on his trade within municipal limits.

Section 411, Bombay City Municipal Act, in terms, deprives every citizen, living within the city or to whom the Act applies, of the power to carry on the business of a butcher. The only exception to that is the grant of a license by the Commissioner and carrying on the trade of a butcher in conformity with the terms of the license. In the Act there is no express provision giving power to the Commissioner to grant a license to carry on the trade of a butcher. By reason of the words used in S. 411, the power is impliedly vested in the Commissioner. If therefore this power is deemed to exist in the Municipal Commissioner impliedly by reason of the terms of S. 411, the power to refuse the license must also be vested in the same authority, because a power to grant necessarily implies a right to refuse, as otherwise the term 'power' would have no meaning. The Municipal Commissioner has therefore discretion under S. 411 of the Act to refuse a license to a butcher to carry on the trade of a butcher within the municipal limits of Bombay: *Rossi* v. *Edinburgh Corporation*, (*1905*) *AC 21* and *27 Bom 307*, *Disting.* [P 396 C 1, 2]

H. D. Banaji—for Applicant.

D. N. Bahadurji—for Opposite Party.

Order.—This is a petition filed under S. 45, Specific Relief Act, praying that the respondent, the Municipal Commissioner, be ordered to issue a license to the petitioner permitting him to carry on the business of a butcher at Charni Road. There is a further prayer asking for an injunction against the respondent prosecuting the petitioner in the Police Court for carrying on the business of a butcher without a license. The petition and the affidavits show that the petitioner has been carrying on the business of a butcher at a shop in Girgaum for many years past. In about 1928, the Municipality, after mature deliberation, came to the conclusion that it was in the municipal interest of the city of Bombay that the sale of meat should be confined to specific areas. From the annexures to the affidavit of Mr. Laud it appears that this policy was reiterated many times in the communications between the Municipal Committee and the Commissioner and the applicants for licenses and the Commissioner. It further appears that in pursuance of that policy the Municipality has erected a market at Chandanwadi. Besides this market, there also exists another market at Chira Bazar, which is a private market, where meat is sold.

The petitioner applied for a license in respect of a shop at Charni Road but that was refused. After repeated attempts made by him to persuade the respondent to reconsider his decision and in view of the fact that the Municipality launched a criminal prosecution against him under the penal section of the Act, the petitioner has made this application to the Court. It is clear from the facts that the petitioner's shop is more than half a mile away from the Chandanwadi market but within half a mile from the private market at Chira Bazar. It also appears that the policy of the Municipality is that shops of this nature should not be permitted within half a mile of a recognised market where meat is sold. In his affidavit the respondent says that this policy has been adopted with a view to facilitate the work of supervision and to meet the general requirements of the locality as a whole. In my opinion, the policy so adopted is not open to question as violating any principle of municipal administration.

On behalf of the petitioner it is first contended that S. 411, City of Bombay Municipal Act, does not empower the respondent to refuse a license when applied for. It is urged that whenever Legislature intended to invest the Commissioner with a discretion, it had done so in specific terms. For this purpose reliance is placed on S. 394 (4). The petitioner further relies on the decision in (1905) A C 21[1] to support his contention that it is only within the power of the Legislature to deprive a citizen of his right to carry on a business as and where he pleases and it does not lie within the power of the Commissioner or any other person, unless expressly invested by the Legislature with such power, to curtail that liberty of a citizen. Further reliance is placed on the decision in 28 Mad 520[2] to show that in the event of a doubt as to the extent of the power of the Commissioner, the construction should be in favour of the subject and against the Commissioner. The petitioner further relied on 26 Bom 396,[3] 27 Bom 307,[4] 27 Bom L R 581[5] and 38 Bom L R 556,[6] in support of the contention that the discretion exercised by the Commissioner in this particular case was arbitrary, and therefore should be set aside. S. 411, City of Bombay Municipal Act, runs as follows :

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[1] **Rossi v. Edinburgh Corporation, (1905) A C 21=91 L T 668.**

[2] **Somu Pillai v. The Municipal Council, Mayavaram, (1905) 28 Mad 520.**

> *411.* No person shall without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf — (a) carry on within the city, or at any municipal slaughter-house, the trade of a butcher; (b) use any place in the city for the sale of the flesh of any animal intended for human food, or any place without the city for the sale of such flesh for consumption in the city.

In my opinion, the first contention of the petitioner is incorrect. S. 411, City of Bomay Municipal Act, in terms deprives every citizen, living within the city or to whom the Act applies, of the power to carry on the business of a butcher. The only exception to that is the grant of a license by the Commissioner and carrying on the trade of a butcher in conformity with the terms of that license. The present case therefore differs materially from the decisions in *Rossi* v. *Edinburgh Corporation*[1] and *Gell* v. *Taja Noora*[4] inasmuch as in those cases there was no express provision made by the Legislature depriving every citizen of his right to carry on the particular trade. The relevant sections quoted in those decisions are the penal sections corresponding to S. 471, City of Bombay Municipal Act. It is therefore not open to the petitioner to contend that the Commissioner has attempted to deprive the citizens of Bombay of their right to carry on the trade of a butcher. In fact by S. 411 of the Act the Legislature has imposed that restriction.

The next contention of the petitioner that the respondent is under an obligation to issue a license when asked for is also unsound. In the Act there is no express provision giving power to the Commissioner to grant a license to carry on the trade of a butcher. By reason of the words used in S. 411, it seems that the power is impliedly vested in the Commissioner. If this view is not accepted, the other alternative would be to consider that there is no power in the respondent to grant the license. That would be against the clear intention of S. 411 and clearly detrimental to the rights of the public, because in that event there would be no licensing authority at all. If this power is deemed to exist in the Municipal Commissioner, impliedly by reason of the terms of S. 411, it follows that the power to refuse the license must also be vested in the same authority, because a power to grant necessarily implies a right to refuse. To consider otherwise would mean that there was an obligation on the Commissioner imperatively to grant a license and that he had no jurisdiction to refuse the same. There appears in the Act no words to justify such a conclusion. Whenever the Legislature desired to impose any such obligation on a public servant, the Legislature used appropriate words to show clearly its meaning. A reference to S. 12, City of Bombay Police Act, quoted in the decision in *Rustom J. Irani* v. *H. Kennedy*[3] makes this position clear. As pointed out by Jenkins, C. J. in that case, the Legislature had deliberately made use of the word "shall" when it intended to impose on a public servant the obligation to issue a license. At the utmost therefore, S. 411 can be construed to mean that the Municipal Commissioner was not under an obligation to issue a license but had the power to issue the same. In that view, as I have pointed out, the power to grant a license must necessarily be accompanied with the right to refuse because otherwise the term "power" would have no meaning.

If the Municipal Commissioner has therefore the power to grant a license it must be a power which he is to exercise in a proper manner, i.e., not arbitrarily or for an ulterior motive. Although no express words are found in the Act giving him the discretion or limiting his discretion in the exercise of his power, in my opinion, that would be the proper view to take of the limits of his power. In the present case the grounds stated by the Commissioner are set out in extenso in his affidavit. So long as the discretion is exercised for the proper municipal administration of the area under the control of the Commissioner, and from no other motive, I am unable to consider that the exercise of the power would be arbitrary or unlawful. The affidavit shows clearly that the Commissioner had exercised his discretion only for the purpose of the municipal welfare of the inhabitants of the particular locality in accordance with the considered policy of the Municipality. If that position is not found to be incorrect, there would be no justification to interfere with the discretion of the Municipal Commissioner.

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[3] Rustom J. Irani v. H. Kennedy, (1902) 26 Bom 396=4 Bom L R 1.

[4] Gell v. Taja Noora, (1903) 27 Bom 307=5 Bom L R 133.

[5] Alimahomed v. Municipal Commissioner of Bombay, A I R 1925 Bom 458=87 I C 771=27 Bom L R 581.

[6] Pachan Ladha v. Municipal Commissioner, Bombay, A I R 1936 Bom 264=164 I C 101 =60 Bom 838=38 Bom L R 556.

On behalf of the petitioner it is contended that the Chandanwadi market has proved a failure and very few stalls are in fact in the occupation of vendors of vegetable, fish or meat. It is therefore contended that the Municipal Commissioner is not at present exercising the discretion in a proper way and the Court should interfere in the matter. While realising that if the market proved to be a failure the Municipal Commissioner may properly reconsider his decision in granting the license to the petitioner, I see no reason at this stage to interfere with the exercise of his discretion. The Commissioner has already intimated to the petitioner that as and when the Chandanwadi market scheme is found to be a failure and the building is directed to be used for another purpose, he would reconsider the question of granting the petitioner a license. So long however as in fact the Chandanwadi market is used for the avowed object of furthering the municipal policy laid down in the resolutions, it cannot be stated that the scheme had failed, and therefore action should be taken on the footing that the scheme did not exist. The Chandanwadi market yet exists for the use and benefit of the vendors who choose to go there. The ground mentioned by the Municipal Commissioner, viz. to facilitate the supervision of such shops, is still applicable inasmuch as there is another market (although a private market) at Chira Bazar where meat is being sold. Under the circumstances I am unable to consider that the exercise of the discretion by the Commissioner on the face of it is arbitrary or unlawful. The Court would not therefore be justified in interfering with the same. The petition is therefore dismissed with costs.

P.R./A.L. *Petition dismissed.*

A. I. R. 1937 Bombay 397

B. J. WADIA, J.

Swatantranandji — Plaintiff — Petitioner.

v.

Lunidaram Jangaldas — Defendant.

Petition in Testamentary Suit No. 12 of 1935, Decided on 16th March 1936.

(a) Executor—Appointment of — Testatrix giving her 'power' to defendant by clause in will—'Power' means her right over property as owner and to manage same—Subsequent clauses in will curtailing defendant's general power—Defendant held was not appointed executor of her will by testatrix.

Clause 4 in the will of a testatrix ran as follows : "As to the 'power' which I have, I give the same to Lunidaram Jangaldas (i. e. the defendant) and one whom he appoints shall carry on 'vahivat' of the property." It was contended by the defendant, in the probate proceedings, that he was appointed executor of the will of the testatrix. The general power given by Cl. (4) to the defendant was curtailed by certain clauses following it :

Held : that the word 'power' used in Cl. (4) meant the right of the testatrix over the property mentioned in the will as owner and to manage the same. Even if that right was given to the defendant, it could not be said that he was appointed executor of her will. On proper construction of clause (4) and clauses restricting the defendant's general power, the defendant could not be said to have been appointed as an executor. Nor the mere giving of the right to manage the property or to appoint a manager could make him the executor. [P 398 C 2]

(b) Will—Probate—Caveat—Person having or asserting interest by inheritance or otherwise in deceased's estate can enter caveat—Test is whether grant of probate to petitioner displaces any right to which caveator is entitled.

A caveat can be entered by any person having or asserting an interest in the estate of a deceased person, and he must show that he has that interest by inheritance or otherwise. A title adverse to that of the testator or to his estate or any portion thereof is not sufficient to sustain the interest. The test is generally this : will the grant of probate to the petitioner displace any right to which the caveator is otherwise entitled ? If so, he has an interest; if not, he has none : *34 Bom 459, Rel. on.* [P 398 C 2]

J. S. Khergamwala and *Lalji Gakaldas* — for Plaintiff Petitioner.

J. D. Davar and *G. C. O'Gorman* — for Defendant.

Order.—This is a petition for the probate of two wills of Mataji Moxabai Guru Muktanandji who died on 13th April 1933. The first will is dated 11th January 1923, and was executed at Saspur (also called 'Saraspur'), Ahmedabad. The second will is dated 3rd April 1933, and was executed at Mulund in the Thana District. The petitioner claims to be her disciple, and has propounded the two wills as executor according to the tenor. Defendant has put in a caveat and has filed two affidavits in support. In his first affidavit dated 3rd July 1935 he contends that on a proper construction of clause 4 of the later will, he has been appointed executor, and the petitioner is not an executor according to the tenor. In his second affidavit filed on 18th December, in continuation of the first, he alleges that the first will and the signature of the testatrix as well as the signatures of the attesting witnesses appearing on it are all forgeries. Reading the two wills together, the petitioner 'appears' to be executor according to the tenor, for, though not expressly nominated as executor, he is a person who has been directed by the wills to perform one or more of the duties involving the functions of an executor, and is, therefore, an executor appointed by necessary implication under S. 222, Succession Act. There are words in the wills in reference to the petitioner which on a reasonable construction point to the rights and duties of an executor. I have, however, advisedly stated at present that plaintiff 'appears' to be the executor according to the tenor, for the first will has been challenged as a forgery. Defendant, on the other hand, relies on clause 4 of the will which in the original Gujarati runs without a break. The clause is translated as follows :

> As to the 'power' which I have, I give the same to Lunidaram Jangaldas (i. e. the defendant) and one whom he appoints shall carry on 'vahivat' of the property.

The difficulty of construing this clause has arisen from the use of the Gujarati word 'पवर' which is merely the way in which the English word 'power' is sometimes pronounced. The word 'power', as used, does refer in the minds of persons who are not well versed in the English language to the probate of a will or letters of administration to the estate of a deceased person. But even as such, the words actually used do not clearly indicate the appointment of the defendant as an executor. The testatrix speaks of the 'power' which she has over her property, referring to the Mulund property mentioned in clause 1, which means her right over that property as owner and to manage the same. If she gives that right to the defendant, it cannot strictly be said that she has appointed him the executor of her will. I do not agree with counsel for the defendant that the question whether defendant is or is not an executor of the will depends on evidence. It is really a question of construction of clause 4 read along with the rest of the will. The words used in clause 4, considered together, do not clearly indicate that the testatrix intended to appoint the defendant her executor. Moreover, the general power which, it is contended, the clause gives to the defendant, is curtailed by certain limited powers which are mentioned in the postscript and which are given to the petitioner. Further, according to Cl. 8, the will which was made in Ahmedabad, and which the petitioner says is the first will he has propounded, is confirmed by the testatrix. I cannot, therefore, hold that on a proper construction of clause 4, read along with the remaining clauses and the postscript, the defendant has been nominated by the testatrix as the executor of her will. He is given the right to manage the Mulund property or to appoint a manager. That does not make him the executor, and it is doubtful whether it makes him even an executor according to the tenor.

The question still remains whether the defendant has sufficient interest in the estate of the deceased for him to sustain his caveat. A caveat can be entered by any person having or asserting an interest in the estate of a deceased person, and it has been held that he must show that he has that interest by inheritance or otherwise : *see* 34 Bom 459.[1] A title adverse to that of the testator or to his estate or any portion thereof is not sufficient to sustain the interest. I think that the test is generally this: will the grant of probate to the petitioner displace any right to which the caveator is otherwise entitled? If so, he has an interest; if not, he has none. At best the defendant can argue, though the point is not taken by him in his affidavits, that he is the executor according to the tenor of the later will. If he succeeds in proving that the first will is a forgery, he may show that he is the executor according to the tenor of the later will, and as such he would have a right to apply for probate to the estate of the deceased. To that extent it can be argued that an important right belonging to him may be displaced by reason of the grant of probate to the petitioner. The point is not free from doubt; but I would still hold that the defendant has an interest in the estate which enables him to oppose the grant of probate of the two wills to the petitioner.

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[1] Pirojshah Bikhaji v. Pestonji Merwanji, (1910) 34 Bom 459=6 I C 523=12 Bom L R 366.

W.D./A.L. *Order accordingly.*

A. I. R. 1937 Bombay 399

BROOMFIELD AND N. J. WADIA, JJ.

Emperor

v.

Nandkishorsinh Gayaprasad
Accused.

Criminal Appeal No. 535 of 1936, Decided on 8th March 1937, against order of City Magistrate, First Class, Bandra.

(a) Motor Vehicles Rules (Bombay) (1915), R. 3 (1)—Applicability—Principles as regards "plying for hire" apply to "letting for hire" for purposes of R. 3—R. 3 (1) applies where letting for hire is in public place and open to any member of public—It does not apply where letting is to selected customer and not in public place - Rule covers also cases where letting is by owner and plying for hire is by servant.

The plying of a motor vehicle for hire means the act of waiting for soliciting customer, and therefore, so soon as any person has hired it, the act of plying for hire is complete. This principle equally applies to letting of a motor vehicle for purposes of R. 3 (1), Motor Vehicles Rules, Bombay. R. 3 (1) applies to letting for hire in public places and this implies that the actual transaction of letting must be done in a public place where it is open for any member of the public to take the car on hire. It cannot, therefore, apply to a case where the letting is to a selected customer and is not done in a public place, as in such latter case the car is not clearly available to any member of the public. R. 3 (1) is also intended to cover cases in which the letting may be done by one person, the owner of the car, and the plying for hire may be done by another person, a servant: *A I R 1928 Mad 166*; *A I R 1929 Lah 422* and *A I R 1930 Bom 161*, *Ref.* [P 400 C 2]

(b) Motor Vehicles Rules (Bombay) (1915), R. 3 (1)—Words 'in public place' govern word 'let' also.

The words 'in public place' in R. 3 (1), Motor Vehicles Rules, Bombay, govern the word 'let' also as they govern the word 'plied' in the same rule. [P 400 C 2]

P. B. Shingne — for the Crown.

H. K. Nargolkar — for Accused.

N. J. Wadia, J.—This is an appeal by the Government of Bombay against the acquittal of the opponent by the City Magistrate, First Class, Bandra. The opponent was prosecuted for having committed a breach of R. 3 (1) of the Motor Vehicles Rules by letting his bus for hire without having obtained a permit as required by that rule. The rule provides that subject to the provisions of Rr. 7 (5) and 7 (5-A), no motor vehicles shall be let or plied for hire in public places without an owner's permit granted by the District Superintendent of Police. The rule mentions the fee to be charged and states that the permit shall be in form A set forth in the schedule to the rules and that the District Superintendent of Police shall enter on the permit the maximum number of passengers, including driver and also cleaner, conductor or agent, if any, and the quantity of luggage or the maximum weight of goods which may be carried at any one time by such vehicle.

The facts of the case were that the opponent had entered into an arrangement with one Mr. Vakil, the Principal of the Pupils' Own School, to bring the pupils of the school in his bus from Khar, Vile-Parle and Santa Cruz to the school and take them back to their homes. The accused was paid at the rate of Rs. 4 per month for students from Khar, Rs. 3 per month for students from Santa Cruz and Rs. 2 per month for students from Vile-Parle, and used to get on an average Rs. 120 a month. He admitted that he had not obtained a license under R. 3 (1) of the Rules from the District Superintendent of Police. The learned Magistrate acquitted the accused holding, on the authority of certain rulings of the Bombay, Madras and Lahore High Courts, that plying for hire implied that there was waiting and soliciting for custom in a public place, and that as this had not been proved, no offence had been committed. It is contended by the learned Government Pleader that the rule deals with letting as well as with plying for hire and that the rulings on which the learned Magistrate has relied, deal with the question of plying for hire and do not govern the case of letting with which we are concerned.

In 32 Bom L R 337[1] it was held by this Court that the expression "to ply for hire" in R. 7 (1) of the Motor Vehicles Rules means to exhibit a vehicle in such a way as to invite those who may desire to do so to hire it or to travel in it on payment of the usual fares, and also to offer its use on payment to any member of the public, thereby soliciting custom. Reference was made in the judgment in that case to a decision of the Madras High Court in 51 Mad 527[2] and 10 Lah 505.[3] The facts in these three cases were different from the facts we are dealing with. In the Bombay case, the accused who held a general license under S. 6, Motor Vehicles Act, and also a license in form A under R. 3 (1) entitling him to let or ply the bus for hire on a certain road, was found proceeding in the bus on a road not covered by the license. He was going to see the District Superintendent of Police in order to obtain an extension of the permit contained in his license in form A. It was held that he had committed no offence as it was clear from the evidence that he was driving the bus on a private errand and could not be said to have been using it as a motor vehicle, meaning a motor vehicle let or plying for hire. In the Lahore and Madras cases the facts were that the accused who held licenses for letting and plying for hire within certain municipal limits were found driving the cars outside those limits with passengers. It was found in both cases that the cars had been let within the licensed municipal limits and it was held that the cars could not be held to have been plied for hire outside the municipal limits where they were found because the act of plying a motor vehicle for hire can only be done at the place and the time the hiring is effected. It was contended on behalf of the Local Board in the Madras case that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, and that it is not a necessary condition that the actual hiring should take place upon that road. That contention was not, however, accepted and the view taken was that the plying of a motor vehicle for hire means the act of waiting for soliciting custom, and that, therefore, so soon as any person has hired it the act of plying for hire is complete.

Although the facts in these three cases are different, it seems to us that the principle laid down as regards plying for hire must apply to letting for the purposes of R. 3. The rule applies to letting in public places and this implies that the actual transaction of letting must be done in a public place where it is open for any member of the public to take the car on hire. It cannot, therefore, apply to a case of the kind we are dealing with where the letting was to a selected customer, viz., the Principal of the school, and was not done in a public place. The car clearly was not available to any member of the public. We are unable to accept the contention of the learned Government pleader that the words "in public places" in the rule do not govern the word "let" and that the rule covers the case of any letting whether that letting be in a public place and to any member of the public or whether it is done in a private place and to a selected customer only. In our opinion the letting referred to in the rule is complementary to the plying for hire and the rule is intended to cover cases in which the letting may be done by one person, the owner of the car, and the plying for hire may be done by another person, a servant. In such a case, if the rule did not provide for letting as well as plying for hire, the owner who let the car would go unpunished. In our opinion the view taken by the learned Magistrate that the accused has not committed a breach of R. 3 (1) is correct and the appeal must, therefore, be dismissed.

A.L./R.K. *Appeal dismissed.*

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[1] Emperor v. Ganesh Ramchandra, A I R 1930 Bom 161=1930 Cr C 485=125 I C 716=31 Cr L J 931=32 Bom L R 337.

[2] Local Fund Overseer Mayavaram v. Pakkirisami Thevan, A I R 1928 Mad 166=106 I C 446=29 Cr L J 30=51 Mad 527=55 M L J 213.

[3] Sardul Singh v. Emperor, A I R 1929 Lah 422=116 I C 885=30 Cr L J 700=10 Lah 505=31 P L R 95.

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N. J. WADIA AND WASSOODEW, JJ.

H. H. Darbar Alabhai Vajsurbhai and *others* — Plaintiffs — Appellants.

v.

Bhura Bhaya and *others*—Respondents.

Appeal No. 59 of 1934, Decided on 9th September 1936, from order of Dist. Judge, Ahmedabad, in Misc. Appln. No. 254 of 1932.

(a) Gujarat Talukdars Act (Bom. 6 of 1888), S. 16 — Decision of District Judge under S. 16 — Second appeal lies from such decision.

The decision of the District Judge under S. 16, Gujarat Talukdars Act, on appeal from the Talukdari Settlement Officer, partakes of the same character as a decree in appeal from an ordinary suit, and therefore, like all such decrees is subject to second appeal to the High Court : *16 Bom 408, Foll.* ; *Dictum in A I R 1925 Bom 241, held obiter and not foll.*; *40 Cal 21, Expl.* [P 403 C 2 ; P 404 C 1, 2 ; P 406 C 1]

(b) Civil P. C. (1908), O. 22, Rr. 2, 3 and 4 —Practice—Appeal—Death of respondents—Order of Court for substitution of names of heirs—It is not duty of appellants to take steps to carry out such order to correct record of Court.

It is no part of the appellants' duty to take the necessary steps to carry out the Court's order for the substitution of the names of the heirs of the deceased respondents who are properly served with notices, in order to correct the record of the Court in terms of its order. This is a ministerial function which the Court's establishment is charged to perform. If it is not performed or neglected, the fault will not lie with the appellant. [P 406 C 1]

(c) Appeal—Abatement—Practice—Abatement is automatic process—Express order of Court is not necessary.

The abatement of a suit or an appeal is an automatic process and in order to work an abatement in either case it is not necessary that the Court would make an express order of abatement: *A I R 1922 All 209, Held overruled by A I R 1926 All 217 (F B)* ; *A I R 1924 Bom 416, Foll.* [P 406 C 2]

(d) Appeal—Abatement — Setting aside — Death of respondent — Application for substitution of heirs beyond time—Delay due to ignorance of appellants' agent who owing to numerous respondents in appeal could not keep efficient watch on them — Reason held sufficient to set aside abatement.

During the pendency of an appeal one of the respondents died, but as the application for substitution of the heirs of the deceased respondent was made beyond period of limitation, the Court made an order of abatement. The delay was explained as due to the ignorance of the appellants' agent who having regard to the numerous respondents in the appeal could not properly keep a more efficient watch on them :

Held: that the reason was sufficient for the purposes of setting aside the abatement. [P 407 C 1]

(e) Civil P. C. (1908), Ss. 151 and 153—Appeal against dead person or persons — Abatement of appeal — Court can allow amendment and permit appellant to add legal representatives.

Where an appeal is presented against a dead person or persons and the appeal has abated, the Court has power, in order to prevent injustice being done, to permit the amendment and allow the appellant to add the legal representatives of the deceased : *31 Mad 86, Dissent.* ; *A I R 1925 Mad 1210 (F B), Foll.* [P 407 C 1, 2]

(f) Civil P. C. (1908), O. 41, R. 20 — Party to original proceedings proposed to be added as party to appeal — Time to appeal against him expired — When such person's interest in appeal still survives stated.

If a party to the original proceedings is proposed to be added as a party to the appeal and the time for appeal against him has expired, the question whether the interest of such person proposed to be added still survives in the appeal must depend on the nature of the litigation, the decree passed, the subject matter of the appeal, and the effect of the decision in appeal in his absence : *A I R 1927 P C 252, Expl.* [P 407 C 2 ; P 408 C 1]

G. N. Thakor and *H. M. Choksi* — for Appellants.

J. C. Shah — for Respondents 1, 8, 10 and 42.

Wassoodew, J.—The facts giving rise to this appeal, so far as a statement thereof is necessary for the present purpose, are these. The appellants who were holders of certain talukdari estate in the District of Ahmedabad filed a suit in 1900 to obtain a declaration regarding their title to a share in that estate in a civil Court. That title was confirmed by the High Court on 6th August 1907. The provisions of the Gujarat Talukdars Act (Bom. 6 of 1888) regulated the procedure in regard to the partition of the estate, and the appellants therefore applied in 1916 to the Talukdari Settlement Officer for the separation of their share in the said estate. To that petition there were numerous parties, the persons interested in the estate being not less than 65. They were therefore impleaded before the said officer for the purpose of effecting a partition. In course of time, before the application was decided, some of them died, but through inadvertence the names of their legal representatives were not brought on the record. In consequence, the Talukdari Settlement Officer dismissed the application in 1923. An appeal was taken to the District Court under the provisions of S. 16, Gujrat Talukdars Act, and the District Judge on 11th January, 1926 reversed the order of the Talukdari Settlement Officer and directed the heirs of the deceased respondents to be put on the record and the partition proceeded with. Upon that order, the matter was taken up by the First Class Subordinate Judge of Ahmedabad who had been appointed by the Local Government as Talukdari Settlement Officer. On the ground of convenience the enquiry was transferred to the Court of the Subordinate Judge of Dhandhuka who was also a Talukdari Settlement Officer. After necessary formalities, several issues were raised for determination before that Officer, all of which except one were decided in favour of the appellants on 26th September 1930. With regard to that one issue, it was held that as the certified copy of the High Court's decision which confirmed in 1907 the decision on title of the Court of first appeal was not produced by the appellants or their pleader, the partition could not be proceeded with. The application for partition was accordingly dismissed with costs.

Against that order an appeal was taken to the District Court under the provisions of S. 16, Gujarat Talukdars Act, on 4th November 1930. In the course of the service of the notices of appeal it was discovered on 15th July 1931, that certain parties were dead and accordingly the matter was reported by the bailiff to the District Judge for orders. Thereupon on 21st October 1931, the appellants brought to the notice of the Court that certain respondents had died in the course of the proceedings before the learned Subordinate Judge, that they had in proper time applied for the substitution of the names of their legal representatives and their application was granted, that notwithstanding that fact the necessary entries of the names of the deceased parties were not made and that in the filing of the appeal they were misled by the copies of the proceedings furnished to them by the Court of first instance. Consequently the appellants made the following prayer to the Court :

> We therefore pray to the Honourable Court that the names of the heirs of the deceased respondents be written as under in the said appeal and amendments be made accordingly in the memo of appeal and an order be made to issue notices which may be served through the Court on the heirs.

It was also brought to the notice of the Court that respondents 20, 30 and 34 had died during the pendency of the prior appeal of 1923 to the District Court, and that although the Court ordered the substitution of the names of their heirs, the necessary corrections were not made. It was also stated that two persons, viz. respondent 12, Matra Sura, and respondent 38, were the only persons who had died pending the appeal on 10th February 1931 and 25th July 1931, respectively, and permission was sought to substitute the names of their heirs.

Upon that petition the learned District Judge on 21st October 1932 made a note to the effect that as the names of the deceased respondents other than the two who had died before the appeal were not brought on the record and that as no application was made within time to bring the heirs of the legal representatives of respondents 20, 30, 34 and 38 on record, the entire appeal abated. He therefore following the ruling in 44 All 459[1] passed a formal order declaring the appeal to have abated and left it to the appellants to have the abatement order set aside.

Thereupon the appellants on 10th November 1932 brought to the notice of the learned District Judge the misunderstanding in regard to the prayer in their former petition and explained its purport and pointed out that upon their petition there was no justification for the order of abatement. They also pointed out that the application for the substitution of the names of the heirs of the deceased respondent 38 was in time and that the delay in regard to a similar application for the substitution of the names of the heirs of the deceased respondent 12 was due to excusable circumstances. Those circumstances were that the appellants' manager was an old man of eighty years, that the appellants were residing at Dhandhuka about thirty miles from Nagadka where the deceased respondent lived, and that having regard to the large number of respondents it was not possible to keep in touch with all so as to enable their manager to inform the Court in time of the death of any one of them. Accordingly it was prayed as follows :

> Under these circumstances we humbly pray that this Honourable Court will be pleased to order the memo of appeal to be amended and cancel or set aside the order of abatement and grant our application (Ex. 16), and pass such other orders as may appear just and proper in the

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[1] Gujrati v. Sital Misir, A I R 1922 All 209=66 I C 554=44 All 459.

interest of justice and order further proceedings in the appeal to proceed according to law.

Accordingly all the persons were served and the learned District Judge, after hearing them on 5th February 1934, found that no sufficient cause had been shown for excusing the delay in regard to the substitution of the names of the heirs of respondent 12 and that there was no reason to set aside the abatement as it was a partition suit in which all the sharers had to be on the record. Against that order this appeal has been filed by the original petitioners, plaintiffs.

Mr. Shah on behalf of the respondents has raised a preliminary objection that no appeal lies from a decision of the District Court under S. 16, Gujarat Talukdars Act. He has relied on the Full Bench ruling in 49 Bom 442.[2] In that case the plaintiff-talukdars had applied to the Talukdari Settlement Officer under S. 11, Gujarat Talukdars Act, for partition and separate possession of their share. In the proceedings certain talukdars disputed the title of some of the defendants to the shares claimed by them. The Talukdari Settlement Officer after making the necessary inquiry under S. 15 of the Act held that the defendants were entitled to a share. The plaintiffs who appealed to the District Court unsuccessfully under S. 16 of the Act, filed a second appeal in the High Court. That appeal was summarily dismissed under O. 41, R. 11, Civil P. C. The plaintiffs thereupon filed a suit in 1920 in the Court of the Subordinate Judge at Dhandhuka for a declaration that the decision in the proceedings before the Talukdari Settlement Officer and in appeals therefrom was without jurisdiction and not binding on them, and for a permanent injunction restraining the defendants from having the decision of the Talukdari Settlement Officer carried out by partition. The defendants contended inter alia that the plaintiffs' suit was barred upon the principle of res judicata by reason of the former decision of the Talukdari Settlement Officer. The trial Judge accepted that contention and dismissed the suit. On appeal, the District Judge reversed the decision, and ordered the suit to be heard on its merits. An appeal having been taken to the High Court, it was argued before the Full Bench that the suit was barred by the rule of res judicata. In reply it was contended that the second appeal to the High Court from the decision of the District Judge under S. 16 of the Act in the former proceedings was incompetent and that the Talukdari Settlement Officer was merely an administrative officer and therefore not competent to try the subsequent suit. Both these contentions prevailed before the Full Bench, which overruled the decision in 16 Bom 408,[3] which was till then good authority for holding that the decision of the District Court on appeal from the Talukdari Settlement Officer partook of the same character as a decree in appeal from an ordinary suit, and, therefore, like all such decrees, was subject to second appeal to the High Court. The Full Bench held that the Talukdari Settlement Officer was not a Court exercising orginal jurisdiction, and it could not be said that because S. 16 of the Act gave a right of appeal to the District Judge from his decision, that decision was a decree within the definition in S. 2 (2), Civil P. C. The effect of the decision of the District Court was thus stated (p. 447):

> The District Court hears the appeal as if it were an appeal from a decree of a Court from whose decision the District Court is authorized to hear appeals, but that is a specific right of appeal based on analogy, and the analogy cannot be extended further so as to entitle a dissatisfied party to take a second appeal to the High Court.

That view was sought to be reinforced by reference to 27 Bom 424,[4] which was a decision upon the provisions of the City of Bombay Improvement Trust Act (Bom. 4 of 1898) constituting a Tribunal of Appeal for purposes of acquisition of land. It was there pointed out that although a right of appeal to the High Court was given by S. 48 (11), the local legislature had no power to control by that Act the jurisdiction or procedure of the High Court. Reference was also made to 39 I A 197,[5] which was regarded as directly in point justifying the view that the decision in 16 Bom 408[3] could not be supported.

It seems clear that if the above view in 49 Bom 442[2] represents the considered opinion of the Court directly affecting the merits of that appeal, it would be binding upon us. It is urged by Mr. Thakor for the appellants that the finding that a second appeal does not lie from a decision of the District Judge under S. 16 of the Act was not essential for the decision of that appeal and is therefore obiter. The only question which the Full Bench was then considering was the question of the correctness of the Appellate Court's decision that the plaintiffs' suit was not barred as res judicata. That question has been separately dealt with by the Full Bench. In the consideration of that question they followed 30 Bom 220[6] which held that a Talukdari Settlement Officer was not a Court of jurisdiction competent to try the suit but an administrative officer. It was emphasised in that connexion that :

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[2] Amarsangji Dungarji v. Deepsingji Pawabhai, A I R 1925 Bom 241=87 I C 588=49 Bom 442=27 Bom L R 345 (F B).

[3] Jamsang Devabhai v. Goyabhai Kikabhai, (1892) 16 Bom 408.

[4] Hari v. Secy. of State, (1903) 27 Bom 424=5 Bom L R 431.

[5] Rangoon Botatoung Co. v. The Collector, Rangoon, (1912) 40 Cal 21=16 I C 188=39 I A 197=6 L B R 150 (P C).

> In considering the competency of a Court for the purpose of deciding on a question of res judicata, the Court must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal.

Consequently, upon that principle the only important issue for decision before the Full Bench was whether the Talukdari Settlement Officer was a Court of competent jurisdiction to try the suit. If he was not, his decision would not operate as res judicata. The Full Bench, however, upon a consideration of the arguments and perhaps of the prayers for declaration in the plaint that the proceedings before the Talukdari Settlement Officer and the subsequent proceedings were without jurisdiction, entered into a discussion as to whether there was a right to carry a second appeal from the order under S. 16 of the Act. Thereby it was traversing upon ground which it was unnecessary to tread for the purpose of deciding the merits of that appeal. It was an expression of view which I think must be regarded as obiter.

In the above view, the pronouncement in *Amarsangji Dungarji* v. *Deepsangji Pawabhai*[2] regarding the right of appeal from the order of the District Court under the Gujarat Talukdars' Act is not binding on us and *Jamsang Devabhai* v. *Goyabhai Kikabhai*[3] is still the ruling authority on the point whose effect, in my view, is not weakened by the dictum in *Amarsangji's case*.[2] The Full Bench followed *Rangoon Botatoung Company* v. *The Collector, Rangoon*,[5] in support of the view that a special appeal to the District Court does not confer by implication a right to second appeal inasmuch as the Judicial Committee had ruled out the contention that

> When once the claimant is admitted to the High Court, he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in course of its ordinary jurisdiction.

It is true that Lord Macnaghten in delivering the judgment of the Board stated the principle very broadly that an appeal does not exist in the nature of things and that a right of appeal from any decision of any tribunal must be given by express enactment. That induced the Indian Legislature to amend the provisions of S. 26, Land Acquisition Act. In 1924 the Judicial Committee of the Privy Council, notwithstanding that amendment, expressed in 27 Bom L R 783[7] its reluctance to interfere with judgments of the Courts in India on matters regarding valuation of property especially in cases of awards affecting the valuation of lands in India. The decision in *Rangoon Botatoung Company* v. *The Collector, Rangoon*,[5] was explained by their Lordships in 49 I A 129.[8] Lord Buckmaster in delivering the judgment made the following observations (p. 136) :

> The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in course of its original jurisdiction . . . When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end ; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be.

In that case it was held that a decision with regard to title in land in land-acquisition proceedings operated as res judicata between the parties in subsequent proceeding, the ratio decidendi being that where the proceedings amount to a civil contest between persons before a Court in respect to the compensation awarded and any determination by the Court as to the rights of the parties thereto is tantamount to a determination in a civil case, the ordinary rule applicable to a decree in a civil suit concerning property will apply.

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[6] Malubhai v. Sursangji, (1906) 30 Bom 220= 7 Bom L R 821.

[7] Narsingh Das v. Secy. of State, A I R 1925 P C 91=86 I C 556=52 I A 133=6 Lah 69= 27 Bom L R 783 (P C).

[8] Ramachandra Rao v. Ramachandra Rao, A I R 1922 P C 80=67 I C 408=49 I A 129= 45 Mad 320 (P C).

The Board had another opportunity of explaining the pronouncement in *Rangoon Botatoung Co.* v. *The Collector, Rangoon*[5] in 43 I A 192.[9] An objection was taken in that case that no appeal lay to the Privy Council as it was decided under the Madras Forest Act, and reliance was placed upon the dictum in *Rangoon Botatoung Company's case.*[5] In overruling that objection on the ground that there was no civil right in dispute in the latter case, Lord Shaw made the following observations (page 198) :

> The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried and the provisions of the particular statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the Courts specifically set up by the statute for the determination of that value.

As regards the case before them, his Lordship observed (p. 198) :

> The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation.

On examining the proceedings in the present case in the light of the above observations, it will be noticed that the Gujarat Talukdars Act affects talukdari estates in general. Under S. 5 a settlement register has to be maintained which involves inquiry into the extent of the interests of different co-sharers in the estate and the determination of the proportionate share of profits in that estate of such co-sharers. The dispute regarding matters which are required to be entered in the register are left for determination to a special agency constituted under the Act. Under S. 21 Civil Courts are barred from entertaining suits or applications for partition and a special tribunal is set up to effect partition by S. 15 read with S. 11. S. 16 then provides for hearing appeals from the decision of that tribunal or officer in the following terms :

> An appeal shall lie from any decision, or from any part of a decision, passed under the last preceding section by the Talukdari Settlement Officer or other officer aforesaid, to the District Court, as if such decision were a decree of a Court from whose decisions the District Court is authorized to hear appeals.

In certain cases that decision may involve the determination of civil rights including the interest and nature of the right of the parties to the contest.

In the present case, after obtaining the decision of the civil Court as to the extent of the appellants' right, the latter asserted before the Talukdari Settlement Officer that a portion of the common property should be divided and assigned to their share. That claim was tantamount to the assertion of a legal right to possession of property. Notwithstanding the fact that S. 16 regarded the decision of the officer as a decree, it had not the force of a decree under S. 2, Cl. (2), Civil P. C., and would not operate as res judicata, considering the nature of the duties of the officer concerned. But upon the remedy of appeal to the District Court the latter Court was seised of the dispute in which the contest was of a civil nature. If that were so, the decision of the Appellate Court would always be regarded as a decree of a subordinate Court within the meaning of S. 100, Civil P. C.; for, as stated in 43 I A 192[9], it would require a specific statutory limitation to exclude the ordinary incidents of litigation. There is no such exclusion or limitation proved for in the Gujarat Talukdars Act.

There is nothing in the judgment in *Amarsangji Dungarji* v. *Deepsangji Pawabhai*[2] to suggest that the latter observations of the Judicial Committee explaining *Rangoon Botatoung Co.* v. *The Collector, Rangoon*,[5] were considered. With extreme respect it seems to me that the Full Bench put a very wide interpretation on the decision in *Rangoon Botatoung Company's case*[5] which their Lordships themselves never intend it to bear. Therefore the governing authority in the Presidency on the point which still holds the field is *Jamsang Devabhai* v. *Goyabhai Kikabhai.*[3] Accordingly in my opinion a second appeal lies from the order of the District Court under S. 16, Gujarat Talukdars Act, and the preliminary objection must be overruled.

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[9] Secretary of State v. Chelikani Rama Rao, A I R 1916 P C 21=35 I C 902=43 I A 192 =39 Mad 617 (P C).

Turning to the merits of the appeal, it is obvious that it was not brought to the notice of the learned District Judge when he passed the preliminary order of abatement on 21st October 1932, that with the exception of two respondents' heirs and legal representatives, all the remaining deceased respondents' heirs and legal representatives were ordered by the Court to be brought on the record upon the application of the appellants. It was no part of the appellants' duty to take the necessary steps to carry out the Court's order for the substitution of the names of the heirs of the deceased respondents who were properly served with notices in order to correct the record of the Court in terms of its order. That was a ministerial function which the Court's establishment was charged to perform. If it was not performed or neglected, the fault would not lie with the appellants. Extracts of the *roznama* have been produced to support the appellants' contention that from time to time within the period of limitation they had applied for the substitution of names of the heirs of the deceased respondents. The correctness of the statement of the appellants in that respect has not been disputed. Perhaps if those facts had been brought to the notice of the lower Court at an earlier stage, it would have restricted its remarks to the prayer in the application, Ex. 16. On the application for amending the record subsequently made on 10th November 1932, the Court became aware that the neglect was due to the office establishment's failure to carry out the Court's order. But the view of the Court was that notwithstanding that neglect "the appellants should have taken care to see that proper respondents were included". The first indication of the failure of the office to amend the record was perhaps given to the appellants and their pleader when a certified copy of the order of the first Court was obtained in 1930. If the pleader of the parties had attempted to compare the names of the numerous parties given in the title with those in the original plaint and in the various applications for amendments thereof, the omission might have been brought to light. But the necessity for that comparison would arise only upon the assumption that the Court's establishment had failed to carry out its orders. That would in my opinion be an unreasonable assumption having regard to the normal course of business and the limited opportunities for comparison which a lawyer possesses in such matters. It would be an obvious injustice to the plaintiffs in the circumstances to dismiss their prayer for amendment of the record when the principal offenders in the matter were not the plaintiffs themselves. As pointed out in (1891) 3 P C 465[10] (page 475):

> One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

It seems to me therefore that a saner and more reasonable view must be taken of the application to amend the record and to bring it in conformity with the orders of the Court passed on the various applications of the appellants. That would affect the legal representatives of the respondents who were found to have died before the appeal was brought to the District Court.

The question will have to be decided with regard to the appeal against respondent 12, Matra Sura. Only two respondents died since the appeal was filed, viz. Matra Sura, respondent 12, and respondent 38. The latter died on 25th July 1931 and the application for the substitution of his heirs was made on 7th October 1931. On that date the appellants also applied for the substitution of the heirs of Matra Sura. The latter part of the application therefore was beyond time and the question arises as to the sufficiency of the cause for not making the application for setting aside the abatement within the time limit prescribed by law. In regard to the procedure in such a case, it may be observed that there was no necessity, as the lower Court has done, of making an express order of abatement. The lower Court relied for that procedure on 44 All 459,[1] but that case has been overruled by the decision in 48 All 334.[11] That was the view followed in 26 Bom L R 378.[12] The ground upon which the appellants asked the abatement order to be set aside, was specifically stated in their petition of 10th November 1932. The statements of fact therein have not been controverted and there is no reason to distrust the appellants in that respect. But the reason given by the lower Appellate Court for rejecting the appellants' excuse was that the appellants lived in the same village as the respondents and if they chose an agent who was old and who lived elsewhere they were themselves to blame. That prejudice was apparently created by the assumption of previous neglect of the appellants in regard to the other respondents who had died long ago. That assumption, as I have pointed out, is erroneous. If the previous activity displayed in the proceedings before the learned Subordinate Judge is attributable to the industry of the agent, the latter's age was not a disqualification to the active prosecution of the appeal. The lapse or neglect in the particular instance was perhaps, as stated above, due to the ignorance of the agent who, having regard to the numerous parties in the appeal, could not properly keep a more efficient watch on them. This one default was perfectly excusable and ought not to result in the destruction of the effort of so many years to bring about a separation of interests of the cosharers involved in the estate. If some reasonable consideration were paid to the difficulties in the nature of things, I think the conduct of the appellants is easily intelligible, and I would accept the cause given as sufficient for the purposes of setting aside the abatement.

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[10] Rodger v. The Comptoir D'Escompte De Paris, (1871) 3 P C 465=40 L J P C 1=24 L T 111 =19 W R 449=7 Moo P C (N S) 314.

[11] Churya v. Baneshwar, A I R 1926 All 217= 93 I C 313=48 All 334=24 A L J 369 (FB).

Then there remains the question as to the form which this order in appeal should take. Essentially this is an appeal from an order refusing amendment and if it were set aside, the question would be of impleading the legal heirs of certain respondents who were not parties to the appeal when it was preferred to the District Court. We were referred to 31 Mad 86[13] for holding that there is no jurisdiction in the Court to direct an amendment in the manner suggested, as there was no proper appeal before the Court, the appeal being filed against a dead person or persons. A contrary view was expressed by the Full Bench of the same Court in 49 Mad 18.[14] With respect I think that view is correct. The learned counsel for the appellants has deliberately invoked the jurisdiction of the Court under Ss. 151 and 153, Civil P. C., so far as the absent deceased respondents are concerned, and has relied upon the power of the Court to add legal representatives after abatement. In view of the peculiar facts of this case, I am strongly in favour of the view that the Court ought to act in a manner which would prevent injustice being done to either side, considering the length of time spent in this litigation. Any ruthless dismissal of the prayers for amendment would merely result in the restoration of *status quo ante litem*, i.e. the status of co-owers with definite shares in the common property. If the partition has to be effectively made, the amendment in the record must be allowed.

It is urged that the Court has limited powers under the provisions of O. 41, R. 20, Civil P. C., to add respondents, and that the effect of the amendment will be nothing short of an order adding parties under the discretionary rule. We were referred in the course of the arguments to a decision of the Privy Council in 55 I A 7[15] in support of the view that no person who is a party to the proceedings in the original Court can be added as a respondent if the time to appeal against him has expired. The assumption that that decision lays down an inflexible rule of interpretation of the expression "interested in the result of the appeal" in O. 41, R. 20, is erroneous. Referring to the provisions of O. 41, R. 20 their Lordships remarked as follows (p. 13):

> That rule empowers the Court to make such party a respondent when it appears to the Court that 'he is interested in the result of the appeal'. Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants.

Those remarks imply that the question whether the interest of the respondents proposed to be added still survives in the appeal, must depend on the nature of the litigation, the decree passed, the subject-matter of the appeal, and the effect of the decision in appeal in their absence. Here is a partition suit instituted in 1916. The extent of the interest of the co-sharers in the estate was determined in 1916. There was no question of limitation when the suit was instituted. The first Court dismissed the suit in 1927. The effect of that dismissal was merely the restoration of the parties to the original status. Referring to the order of dismissal, there is nothing in it which has the effect of a decree in the defendants' favour improving their status before the suit. In consequence, their interest in the subject matter of the appeal is the same as it was before. In these circumstances I think the discretion could properly be exercised in favour of the appellants' request that the heirs and legal representatives of the deceased respondents be added as parties to the appeal before it is heard.

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[12] Vijayasing v. Shivajirao, A I R 1924 Bom 416 =80 I C 761=26 Bom L R 378.

[13] Veerappan Chetty v. Tindal Ponnen, (1907) 31 Mad 86=17 M L J 551.

[14] Gopala Kristnayya v. Lakshmana Rao, A I R 1925 Mad 1210=49 M L J 590=49 Mad 18 (F B).

[15] Chokalingam Chetty v. Seethai Ache, A I R 1927 P C 252=107 I C 237=55 I A 7=6 Rang 29 (P C).

I think therefore that this appeal must be allowed and the order of abatement set aside and the heirs and legal representatives of the respondents who died pending the appeal substituted in their place. As regards those who died before the appeal was filed, the proper order to make is to amend the proceedings in the light of the orders passed by the original Court bringing the heirs and legal representatives of the deceased respondents on record. That amendment should be made in the title of the appeal and the necessary parties joined.

N. J. Wadia, J.—I agree with the view taken by my learned brother that the remarks of the Full Bench in 49 Bom 442[2] that no second appeal lies to the High Court from a decision of a District Court under S. 16, Gujarat Talukdars' Act, must be treated as obiter. The question whether a second appeal lay did not arise in that case and was not necessary for the determination of the appeal. The plaintiffs in that case had sued for a declaration that the decision in the proceedings before the Talukdari Settlement Officer and in the appeals therefrom to the District Court and the High Court was without jurisdiction and was not binding on them, and for a permanent injunction restraining the defendants from having the decision of the Talukdari Settlement Officer carried out by partition. The defendants' contention was inter alia that the suit was barred as res judicata. The trial Court held that the plaintiffs' suit was so barred and dismissed it. On appeal the District Court reversed that decision and ordered the suit to be heard on the merits. The High Court in second appeal confirmed the decree of the District Court. The only question therefore before the Full Bench was whether the matter was res judicata. The Full Bench held, following the decision in 30 Bom 220[6], that in considering a question of res judicata the Court must look to the power of the Court in which the suit was instituted and not to the power of the Court by which that suit was decided on appeal, that the Talukdari Settlement Officer before whom the proceedings were started was an administrative officer and not a Court, and that his decision could not therefore operate as res judicata. On this view the question whether a second appeal lay from the decision of the District Court to the High Court did not really arise for consideration. Whether a second appeal lay or did not lie, the decision of the Talukdari Settlement Officer could not operate as res judicata.

In *Malubhai* v. *Sursangji*,[6] in which there was an appeal from a Talukdari Settlement Officer's decision to the District Court and a second appeal from the District Court's decision to the High Court, it was nevertheless held that the Talukdari Settlement Officer's decision did not operate as res judicata, and that the fact that the proceedings had come up in second appeal to the High Court would not better the plea of res judicata. The result of the appeal before the Full Bench in *Amarsangji's case*[2] would therefore have been the same, even if the Full Bench had taken the view that the previous decision in 16 Bom 408[3] was correct and that a second appeal lay from the decision of the District Court to the High Court. The view of the Full Bench on this point must therefore, in my opinion, be treated as obiter, and I am with great respect of opinion that that view is not correct and that the earlier view in *Jamsang's case*,[3] in which it was held that a decision of the District Court on appeal from the Talukdari Settlement Officer is subject to second appeal to the High Court, is still good law. The Full Bench in *Amarsangji's case*,[2] in arriving at its conclusion, was largely influenced by what it considered was the effect of the Privy Council decision in 39

I A 197.[5] That was a case under the Land Acquisition Act, and the question was whether an appeal lay to the Privy Council as of right from an award of a High Court under that Act. Lord Macnaghten, in dealing with the contention that an appeal lay to the Privy Council, said (p. 200):

> It was admitted by the learned counsel for the appellants that it was incumbent upon them to shew that there was a statutory right of appeal. As Lord Bramwell, then Bramwell, J. A., observed in (1877) 3 Q B D 1[16]: 'An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment.' A special and limited appeal is given by the Land Acquisition Act from the award of 'the Court' to the High Court. No further right of appeal is given. Nor can any right be implied.

After dealing with the arguments raised by Ss. 53 and 54 of the Act, he said (p. 201):

> That section (S. 54) seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

The Full Bench in *Amarsangji's case*[2] relied on these remarks in support of the view which they took that the decision in *Jamsang's case*[3] could not be supported and that no second appeal lay from the decision of the District Court to the High Court. In a later Privy Council case, however, 43 I A 192,[9] their Lordships explained what the effect of their ruling in *Rangoon Botatoung Company* v. *The Collector, Rangoon*,[5] was. In that case, *Secy. of State* v. *Chelikani Rama Rao*,[9] certain claims made by zamindars in proceedings under the Madras Forest Act (5 of 1882), were dismissed by the Forest Settlement Officer whose judgments were affirmed by two decisions of the District Court of Godavari. The decisions of the District Court were reversed and varied by the High Court, and it was contended in the appeal before the Privy Council on behalf of the Secy. of State that after the decision of the District Court all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute. S. 10, Madras Forests Act, provides that the Forest Settlement Officer

> shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part.

Section 10, sub-cl. (ii) of the Act, provides that:

> If such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only.

In support of the Secretary of State's contention that no appeal lay to the High Court, reliance was placed on the decision of the Privy Council in *Rangoon Botatoung Company's case*.[5] Dealing with this contention their Lordships said (p. 198):

> It was urged that the case in 39 I A 197[5] enounced a principle which formed a precedent for excluding all appeals from the decision of the District Court in such cases as the present. Their Lordships do not think that that is so. In the *Rangoon case*[5] a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court which under the Act meant 'a principal Civil Court of original jurisdiction'. Two Judges sat as 'the Court' and also as the High Court to which the appeal is given from the award of 'the Court'. The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried and the provisions of the particular statute, it was held that there was no right 'to carry an award made in an arbitration as to the value of land' further than to the Courts specifically set up by the statute for the determination of that value.
>
> The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation.

In holding that the contention urged on behalf of the Secretary of State was not well founded, they said (p. 197):

> Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench in 11 Mad 309,[17] a decision which was given in 1886 and has been acted on in Madras ever since.

It appears therefore that the Full Bench was not justified in applying to proceedings under the Gujarat Talukdars Act the principles laid down by the Privy Council in the *Rangoon Botatoung Com-*

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16. Sandback Charity Trustees v. North Staffordshire Railway Co., (1877) 3 Q B D 1=47 L J Q B 10=37 L T 391=26 W R 229.

17. Kamaraju v. Secy. of State, (1888) 11 Mad 309 (F B).

pany's case.[5] S. 16, Gujarat Talukdars Act, provides that an appeal shall lie from any decision, or from any part of a decision, passed under the last preceding section by the Talukdari Settlement Officer or other officer aforesaid, to the District Court, as if such decision were a decree of a Court from whose decisions the District Court is authorized to hear appeals. The language of this section is stronger than that used in S. 10, Madras Forest Act, inasmuch as it expressly provides that an appeal shall lie from the decision of the Talukdari Settlement Officer to the District Court as if the decision of the Talukdari Settlement Officer were a decree of a Court subordinate to the District Court. The District Court is therefore "appealed to as one of the ordinary Courts of the country," and following the view taken by the Privy Council in 43 I A 192,[9] a second appeal would lie to the High Court as was held in *Jamsang Devabhai* v. *Goyabhai Kikabhai.*[3] For these reasons I agree that we are not bound by the Full Bench decision in *Amarsangji's case*[2] and that a second appeal lies to this Court.

On the merits of the case I have nothing to add to the judgment delivered by my learned brother and agree with the orders proposed to be passed by him.

Per Curiam.—In view of the orders passed with regard to the amendment of the plaint, we think that the appellants must bear the costs of the respondents in this appeal and the costs hitherto incurred in the District Court.

P.R./D.S. *Appeal allowed.*

A. I. R. 1937 Bombay 410

B. J. WADIA, J.

Aboobaker Latif — Petitioner.

v.

Reception Committee of the 48th Indian National Congress and *another* —Respondents.

Award No. 22 of 1935, Decided on 27th August 1936.

(a) Arbitration — Award — Setting aside—Legal misconduct, meaning of —If material piece of evidence is tendered and rejected, it may amount to misconduct entitling party to set aside award — Party is not precluded even if he himself has suggested arbitrator.

Legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings, and the onus of proof lies on the party who alleges it. The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged by the party have been strictly proved. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to set aside the award. And a party is not precluded from impeaching the award on the ground of misconduct even if the arbitrator has been suggested by such party: *Williams* v. *Wallis & Cox*, *(1914) 2 K B 478, Ref.* [P 411 C 2; P 412 C 1; P 414 C 1]

(b) Arbitration — Award — Setting aside—Objections must affect substantial justice of case — Irregularites must amount to no hearing.

In order that the Court may set aside an award which has been duly made, the irregularities complained of must be of such a nature as to amount to no hearing at all. Parties cannot get out of an award upon objections which do not affect the substantial justice of the case: *A I R 1914 P C 105, Foll.* [P 416 C 1]

(c) Arbitration — Award —Evidence—Evidence Act does not apply to arbitrations — But rules of evidence founded on principles of justice and public policy must not be disregarded.

The Evidence Act does not apply to arbitration. But that only means that an arbitrator is not bound by the technical and strict rules of evidence. He must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. [P 416 C 1]

(d) Arbitration Act (1899), S. 13—Court is not bound under S. 13 to act only on grounds mentioned in Para. 14, Sch. 2, Civil P. C. — General grounds for remitting award stated —Award cannot be remitted in part.

The Court is not bound under S. 13, Arbitration Act, to act only on the grounds mentioned in Para. 14 of Schedule 2, Civil P.C. The grounds on which an award may be generally remitted are: (a) that there was some defect patent on the face of the award; (b) that the arbitrator had made a mistake, and himself desired that the award should be remitted to him; (c) that some material evidence was discovered since the making of the award which might have affected the arbitrator's decision; and (d) misconduct. The grounds are not exhaustive. The grounds for remitting an award are much wider than those for setting it aside, but the jurisdiction is statutory and cannot be increased or decreased. Under S. 13, Arbitration Act, the Court must remit the award as a whole. It has no jurisdiction to remit only a part of the award for reconsideration. *Re Arbitration between Montgomery, Jones & Co.* and *Liebenthal & Co.*, *(1898) 78 L T 406, Rel. on.* [P 416 C 2; P 417 C 1]

J. D. Davar and *J. S. Khergamwala*—for Petitioner.

Lalji Gokaldas and *M. P. Amin* —for Respondents.

Order.—This is a petition to set aside an award made under the Indian Arbitration Act by one Mr. S. D. Prabhavalker on 2nd February 1935, in respect of certain disputes between the petitioner and the two respondents representing the Reception Committee of the 48th Session of the Indian National Congress regarding timber, bamboos, corrugated iron sheets, rafters and other materials supplied by the petitioner to respondents in or about October 1934 for the construction work of certain temporary buildings and structures in an area enclosed at Worli and styled for the time being "Abdul Gafar Nagar". Part payments were made to the petitioner for the materials supplied and lent on hire, and after giving credit for the same he made up his bills including his claim for the damage alleged to have been done to some of his materials by the respondents' servants and agents. The bills amounted to Rs. 19,000 odd. This amount was disputed by the respondents, and the disputes were referred to the sole arbitration of Mr. Prabhavalker. The submission paper is dated 17th December 1934. It is provided in the recitals that the arbitration shall be conducted according to the provisions of the Arbitration Act, and that the parties agree to abide by and accept the award in all respects as final and legally binding. The same arbitrator, Mr. Prabhavalker, was also appointed in similar disputes which arose between the respondents and two other merchants, one Abdul Gani Sumar and Miya Ahmed Isa. Abdul Gani Sumar has also filed a petition to set aside the award made in his arbitration, being award No. 21 of 1935. The parties to that arbitration however intimated to the Court that they had agreed between themselves to abide by the final decision in the present petition.

The arbitrator awarded payment of a sum of Rs. 8,324-11-8 to the petitioner inclusive of the part payments already made to him, and he also awarded that certain materials should be returned to the petitioner.

Petitioner is a timber merchant carrying on business in the name and style of Messrs. Standard Timber Trading Co., and he seeks to set aside the award on certain grounds of misconduct on the part of the arbitrator. Legal misconduct is a term which is commonly used in reference to awards, but it has always been found difficult to give an exhaustive definition of the term. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. It has also been described by Atkin, J. in (1914) 2 K B 478[1] at p. 485 as "such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice, ..." The grounds of misconduct alleged by the petitioner are spread over his petition and also mentioned in para. 19 at the end. Counsel for the petitioner in his opening address stated that the important grounds of misconduct on which he relied were four in number :

(1) That the three arbitrations, namely, the arbitrations of the petitioner and the two other merchants, were conducted by the arbitrator at one and the same time ;

(2) that the petitioner was not allowed an opportunity to produce before the arbitrator the Congress workers who had signed certain disputed vouchers of the petitioner, especially one Mulshankar ;

(3) that the petitioner wanted to cross-examine respondent 2, but he was not allowed to do so by the arbitrator in spite of the petitioner's protest ; and

(4) that the arbitrator conferred with respondent 2 behind the back of the petitioner.

There are certain other grounds alleged in the petition for attacking the award, namely, that it was improperly procured and that it was bad upon the face of it ; but these have not been pressed by counsel nor argued. There was some evidence and argument as to which of the parties suggested the name of the arbitrator, but that, in my opinion, is not at all relevant to this inquiry for, even if the petitioner suggested the name of the arbitrator, it cannot preclude him from impeaching the award on the ground of misconduct. The arbitrator is a professional gentleman.

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[1] Williams v. Wallis and Cox, (1914) 2 K B 478=83 L J K B 1296=110 L T 999=78 J P 337=58 S J 536=12 L G R 726.

He is an L.C.E. of the Bombay University and a member of the Institute of Engineers in India. He also stated that he was an Executive Engineer in the service of the Bombay Improvement Trust for about sixteen years. At or about the time when the materials were supplied by the petitioner to the respondents, he was a member of the Construction Board of the Reception Committee of the Congress, but that fact was previously disclosed and known to the petitioner.

Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings, and the onus of proof lies on the party who alleges it.

The first ground of misconduct is that this arbitration was not conducted separately but simultaneously with the two arbitrations of the two other merchants, Abdul Gani Sumar and Miya Ahmed Isa, that is to say, at one and the same time, in the arbitrator's office. The first meeting was held on 31st December 1934, when all the three merchants were present in the office. Petitioner said that he and the two others were questioned by the arbitrator in the matter of their arbitrations one after the other and in all the arbitrations at one and the same time, and that this process was repeated at all the subsequent meetings. Respondent 2 in his evidence as well as in his affidavit in reply to the petition has denied that the arbitrations were heard together. The arbitrator was called by the respondents, and I allowed him to be examined and cross-examined upon the course of the procedure he followed and the materials he utilised in arriving at his decision. He was not allowed to be cross-examined as to the reasons for his award and the calculations upon which it was based. I also did not allow either of the parties to go into the figures and the calculations made by the arbitrator. The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged by the petitioner have been strictly proved.

The arbitrator in his evidence denied that he questioned all the three merchants together at one and the same time. It is true that they all went together to his office on the same dates, but he said that he took up the arbitration of each one of them separately on those dates, that is, he partly went into one, and then took up the other two in their turn. He stated that the petitioner replied on behalf of Abdul Gani Sumar in the arbitration of Abdul Gani Sumar, as the latter was slow and dull in understanding questions, and, further, that at the end of the first meeting on 31st December, he gave directions orally to all the three merchants together to bring before him the vouchers in respect of the materials supplied by them and the translations of their bills in English in their respective arbitrations. He also made his awards in the three arbitrations on the same date, though separately. It does not necessarily follow from all this that the arbitrations were heard together. Counsel referred to the three sheets of notes taken by the arbitrator in these proceedings. It has been held that it is generally desirable that an arbitrator should make notes of the proceedings before him, though even the absence of notes is not in itself a ground for setting aside his award, if the party objecting did not protest until after the award had been made. The allegation against the arbitrator, however, is that he took down short notes on loose pieces of paper, two specimens of which are put in as Ex. D, and that the notes contained in the three larger sheets which have been put in as Ex. 6 were made up subsequently, that is, after the petitioner wanted to have the award filed in Court in order to challenge it. This allegation is made by the petitioner in his petition, but in his cross-examination he was not at first prepared to go to that length, and when pointedly asked, he replied, "How could I say that these notes were subsequently made up?" Later in his cross-examination he stated that the notes were subsequently made up. On reading the notes, I find that they have been taken somewhat roughly, and not always intelligently, and contain statements made by the parties, together with arguments and observations, all mixed up. The arbitrator has also referred to the petitioner in the notes as the Standard Timber Trading Company, as the Company, as the Company's representative, and also as "merchants", and it is the use of the latter expression on which counsel for the petitioner relied to show that the reference to "merchants" is to all the three merchants whose arbitrations were proceeding before the arbitrator. Under date 3rd January 1935, however, there is a reference to "merchants" which, in my opinion, is a reference to the petitioner alone.

Counsel further relied on the fact that the arbitrator has awarded a return to the petitioner of 1250 "Malbari Kathis" from the respondents' stock, whereas according to the order placed with him petitioner had not supplied any Malbari Kathis at all, in order to show that the arbitrations were heard together. Petitioner had supplied "Batwani Bamboos" to the respondents; Abdul Gani Sumar had supplied "Malbari Kathis" to the respondents. On the other hand, the arbitrator stated that he was informed by the petitioner that "Batwani Bamboos" and "Malbari Kathis" were one and the same, and he also stated that he took the price to be the same. In one place in his notes under date 31st December 1934, he has also put the words "Malbari Kathis" over "Batwani Bamboos", and it is not suggested that this was done subsequently. The petitioner denied having given such information to the arbitrator. The arbitrator stated that proceedings were conducted before him in Hindustani, and that he read out the notes at the end of each meeting and explained them to the petitioner in Hindustani. This latter statement was not put to the petitioner, and I cannot act upon it in the absence of an opportunity to the petitioner to reply to it. Petitioner stated that the proceedings were all conducted in Gujarati, and that the arbitrator understood Gujarati. It must, however, be pointed out here that the arbitrator stated that he had made separate notes also in the arbitration of Abdul Gani Sumar, and that statement has not been challenged. I am not concerned with the third merchant, as the proceedings in his arbitration were over after a meeting or two, and he has accepted the award. It was open to the petitioner to have called the two other merchants or at least Abdul Gani Sumar who was present in Court throughout these proceedings to support him in his allegation that questions were put to all the three at one and the same time and that the notes relied on were not taken at the time, but no one has been called. The petitioner himself did not impress me as a reliable witness, his answers not being always consistent. I have already stated before that the notes have not been intelligently written. But I am not prepared to hold that they were subsequently made up from memory. Reading the notes as a whole, I do not think it probable that any man relying merely on his memory could have reproduced all those arguments, figures, and observations in both the arbitrations after the award had been made. However rough the notes may be, the allegation that they were made up is without foundation. In my opinion the arbitrations were not conducted together, and the first ground of misconduct therefore falls to the ground.

The second ground of misconduct alleged is that the petitioner was not given an opportunity to call before the arbitrator one Mulshankar and another man by the name of Mishra, but particularly Mulshankar, who were Congress workers at the time, and who along with other workers were taking delivery of materials supplied by different merchants in the different sections of "Abdul Gafar Nagar", and signing the vouchers of the merchants, whose goods they took delivery of. Petitioner had about eighty of such vouchers. He produced them for inspection by respondent 2, and before the arbitrator; and some of them were disputed by respondent 2. Thereupon the petitioner wanted respondent 2 to produce a book which has been called a stock-book or a store-book in which he alleged that entries were made in respect of the materials delivered by merchants from time to time. This book was first referred to in the arbitrator's office when the vouchers were being checked and examined by respondent 2 some time between 11th and 30th January 1935. Respondent 2 did not produce the book when called upon, alleging either that he was not bound to produce it, or that it was incomplete as all the entries from smaller books kept by the workers were not entered up in this general stock-book, or as he alleged in his affidavit in his reply to Abdul Gani Sumar's petition, because he was not bound to produce it in order to prove the opponent's claim. It was, however, stated by the arbitrator in his evidence that its production was ultimately not pressed, as it was agreed that in respect of the disputed vouchers for which the book was required the workers who had signed those vouchers should be brought before him. This agreement was also mentioned by respondent 2 in his evidence, but it is not referred to in his affidavit, and is denied by the petitioner. The agreement is referred to, but not clearly recorded, by the arbitrator in his notes. In his evidence he further stated that he did not attach any importance to the book and did not ask respondent 2 to produce it. Counsel for the petitioner thereupon argued that this amounted to a rejection of the book by the arbitrator. In his notes as of 30th January 1935, the arbitrator has stated that respondent 2 was not willing to produce the book as it was not up to date, and he adds, "but I think the reason in not producing the stock-book is that all the entries must not be in the book". It was suggested that the second "not" has been subsequently interpolated, and that the antithesis to the previous sentence introduced by the conjunction "but" can only have a meaning if the word "not" was originally not there. If that was so, the arbitrator could not have consistently said in his evidence that he attached no importance to the book, and did not call for it. It must also be pointed out that the word "not" does not appear to have been written in a different ink. The only inference that the Court can draw from the statement in the notes and from the arbitrator's evidence is that ultimately he attached no importance to the book, because in lieu of the evidence which the book might have contained, the men who had signed the disputed vouchers were to be produced before him. The petitioner himself admits that they were to be produced; in fact it is his grievance against the arbitrator that he got no opportunity to call one of them, namely Mulshankar.

The question still remains whether the non-production of the stock-book amounts to misconduct on the part of the arbitrator, and whether this has caused substantial injustice to the petitioner. As the book was in fact not tendered in evidence, it cannot be strictly said that it was rejected by the arbitrator. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the petitioner to set aside the award : *see* (1914) 2 K B 478.[1] In that case, however, the evidence which it is alleged was rejected was material on the landlord's claim for breach of the tenant's covenant to repair, and it was in doubt before the Appeal Court whether such evidence was tendered and excluded or not. In this case it is clear that the stock-book was not tendered and rejected. The arrangement was to produce the men who had signed the disputed vouchers before the arbitrator, and if in view of that arrangement the arbitrator thought that no importance should be attached to the production of the book, it cannot be said that in law he rejected it. Nor has any substantial injustice resulted from its non-production. Out of the vouchers produced by the petitioner, eleven were signed by Mulshankar. Of these, the arbitrator stated that he accepted ten, and he rejected one, because it contained an endorsement at the back that the goods had been rejected and returned. The endorsement bears nobody's signature, but the arbitrator said that he saw it when it was produced before him by the petitioner, and the voucher was also given back to the petitioner. I do not believe the petitioner when he said that he saw the endorsement in Court for the first time. Moreover, why one only out of eleven vouchers was singled out for a subsequent false endorsement at the back has not been explained. Seeing the endorsement, the arbitrator was entitled in his judgment to reject it. The two disputed vouchers which bear the initials of Deshpande were accepted as genuine after Deshpande had admitted that the initials were his. The one disputed voucher signed by Mishra was accepted by the arbitrator, as he said in his evidence, and I have no reason to disbelieve him. One unsigned voucher was not considered, as it bore no signature and no explanation about it was forthcoming from the petitioner. Under the circumstances it was stated both by respondent 2 and the arbitrator that the question of calling Mulshankar did not arise at all. His name also does not appear in the notes, whereas that of Deshpande does. The name of Mishra appears in the notes, though the last note is not a note of what transpired at a meeting, but what the arbitrator noted down for his own guidance when Mishra could not be produced. However, as I have said before, he has accepted the one disputed voucher signed by Mishra. The only voucher about which the petitioner could have a grievance was that of Mulshankar which bore the endorsement, but as I have already said, the arbitrator was justified in rejecting it in the absence of any proof that the endorsement was subsequently forged. The non-production therefore of the stock-book does not amount to misconduct on the part of the arbitrator. If there was any misconduct or default, it was that of respondent 2, and as I have already said, it was not produced by him because of an arrangement to call the men who had signed the vouchers.

The third ground of misconduct as stated by counsel was that no opportunity was given to the petitioner to cross-examine respondent 2. It does not appear on the notes that the petitioner applied to cross-examine respondent 2, nor was respondent 2 asked about it. Counsel, however, in his closing address went further and stated that no opportunity was given to the petitioner to produce all his evidence, and that the arbitration was closed without such evidence being produced. It would, in my opinion, be certainly misconduct if the petitioner wanted to call any material and relevant evidence and the arbitrator prevented him, or if the petitioner tendered such evidence and the arbitrator rejected it. There is however nothing on the record either in the notes or in the petition or in the evidence that the petitioner wanted to call any evidence or that he wanted to cross-examine respondent 2. His only statement in evidence was that neither he nor respondent 2 was examined on oath. He did not say that he offered to give evidence himself nor that he wanted to cross-examine the respondent. I have already dealt with the petitioner's grievance regarding Mulshankar. It is true that on the very day the first meeting was held, the time for making the award which was originally 21 days from the date of the submission paper was extended to 7th February 1935. On 3rd January, nothing was done as the vouchers and the translated bills were not produced, but between 11th and 30th January, the parties met in the arbitrator's office for inspection of the vouchers on three or four occasions, the last of such occasions being about 24th or 25th January. The substance of what happened on those occasions the arbitrator has put down under 3rd January 1935, as if it was a complete record of a meeting on that date. This was a very irregular way of taking notes. However, on 28th January he gave notice to both the parties that 30th January will be the date of the last meeting, and he stated in his notice that the parties should be present with any evidence that they wanted to tender. What actually happened on the 30th was that after some discussion the petitioner was to bring the man who had signed the disputed vouchers, and the only man's name mentioned in the notes is that of Deshpande. The petitioner did not say he wanted to call any evidence. On the other hand respondent 2 stated that the arbitrator said at the end of the meeting that the arbitration was closed, and I believe him. There was no meeting on the next day, but it appears that Deshpande was produced before the arbitrator either on that day or on 1st February. The award was made on the 2nd, which was five days before the last extended date. Petitioner saw the arbitrator on 31st January, and did not even then say that he wanted to call any evidence. The only man whom he wanted to call according to him was Mulshankar, but according to the arbitrator and respondent 2 Mulshankar's presence was not necessary. Petitioner alleges that he protested on 2nd February, when he was told that the award had already been made on the 2nd. On the other hand, the arbitrator stated that he never spoke to the petitioner at all at that time, and that in fact the award was not ready till the evening. The petitioner did not put on record his protest against the conclusion of the arbitration, and I do not think merely because the award was made a few days before the last extended date, that the petitioner is now entitled to say, on being dissatisfied with the award, that he was prevented from calling further evidence. The arbitrator's clerk, Mr. Rele, was called to give evidence as to an interview he had with the petitioner on 2nd February, but I am not prepared to accept Mr. Rele's statement; the interview has not been referred to in the affidavit of respondent 2.

The only other ground urged is that the arbitrator saw respondent 2 behind the back of the petitioner. Of this there is no evidence at all. All that the petitioner said was that he inferred that respondent 2 must have seen the petitioner, because the arbitrator told the petitioner that the Congress had no funds. The arbitrator denies having made such a statement, and I believe him. Counsel further said that the arbitrator telephoned to respondent 2. But there is no evidence that they spoke about matters connected with the arbitration, and I believe both the arbitrator and respondent 2 when they said that they did not speak to each other behind the petitioner's back on any such matter.

These are the important grounds of misconduct alleged by the petitioner. The arbitration was, in my opinion, not conducted as regularly and as methodically as it should have been. The award also might have been put in proper form. I should have expected that the notes taken by the arbitrator would not be as rough as they are. But are these irregularities such as would vitiate the award? In order that the Court may set it aside, the irregularities must be of such a nature as to amount to no hearing at all. This has been laid down by the Privy Council in 16 Bom L R 413.[2] That is not the case here. It has also been held by Lord Halsbury in (1905) A C 78[3] at p. 80 that if the conduct of the proceedings is slip-shod and irregular, as in that case it was, it might tend to injustice. That is not so here either. It is well established that parties cannot get out of an award upon objections which do not affect the substantial justice of the case. It is true that the Indian Evidence Act does not apply to arbitrations. But that only means that an arbitrator is not bound by the technical and strict rules of evidence. He must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy, and I cannot say that they were so disregarded in this arbitration. It was stated by Cockburn, C. J. in (1867) 2 Q B 367[4] at p. 375:

> I would observe that we must not be ever ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding ....

Scrutton, L. J. observed to the same effect in 2 K B 771,[5] when he stated at p. 778 that the Court does not interfere with the award of commercial arbitrators unless there is substantial injustice. I have considered all the facts and circumstances of the case, and I do not think that any ground of misconduct has been strictly proved on account of which I can set aside the award under S. 14, Arbitration Act.

Even if the misconduct is not of such a nature as to vitiate the award, the next question is whether the Court should remit the award to the arbitrator for reconsideration under S. 13 of the Act, which provides that the Court may from time to time remit the award to the reconsideration of the arbitrators or umpire. Under Para. 14 of Sch. 2, Civil P. C., the Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator upon such terms as the Court thinks fit on the grounds mentioned therein. The Court is however not bound under S. 13 Arbitration Act, to act only on the grounds mentioned in Para 14, Sch. 2 to the Code In the case in 78 L T 406,[6] Chitty, L. J. stated the following grounds on which an award may be generally remitted: (a) that there was some defect patent on the face of the award; (b) that the arbitrator had made a mistake, and himself desired that the award should be remitted to him; (c) that some material evidence was discovered since the making of the award which might have affected the arbitrator's decision, and (d) misconduct. The grounds are not exhaustive, but this case has been relied on and followed in 49 Cal 646[7] at p. 654. The grounds for remitting an award are much wider than those for setting it aside, but the jurisdiction is statutory and cannot be increased or decreased. Is this a case in which the Court should exercise its power to remit the award to the arbitrator? It was argued that the question of damages was not considered at all by the arbitrator; but I am not satisfied that it was not. No question was put to him about it when he was in the box. According to his award, items 10, 11 and 13 refer to damages. It may be that he has awarded a much smaller sum than the petitioner claimed, but that is not a ground for remission. The only other ground was that the arbitrator had ordered the return of 1250 'Malbari Kathis' to the petitioner. As to the cost of 1850 'Malbari Kathis', I do not

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2. Amir Begam v. Badruddin Husain, A I R 1914 P C 105=23 I C 625 = 17 O C 120=36 All 336=16 Bom L R 413 (P C).
3. Andrews v. Mitchell, (1905) A C 78 = 74 L J Q B 333=91 L T 537.
4. *In re* Hopper, (1867) 2 Q B 367=8 B & S 100 =36 L J Q B 97=15 L T 566=15 W R 443.
5. Olympia Oil and Cake, Co. v. Macandrew Moreland & Co., (1918) 2 K B 771 = 88 L J K B 227=119 L T 553=83 J P 9=34 T L R 581=16 L G R 745.
6. *Re Arbitration between* Montgomery, Jones & Co. and Liebenthal & Co., (1898) 78 L T 406.
7. U. M. Chowdhury & Co. v. Jiban Krishna Ghose & Son, A I R 1922 Cal 447 = 69 I C 995=49 Cal 646.

think there can be any grievance, because the price of Rs. 3-4-0 per 100 is the price mentioned in the order, and I am not satisfied that that price was only subsequently added at the instance of the respondents.

The only question therefore to consider is about the return of 1250 'Malbari Kathis,' and as to that I have the arbitrator's explanation. It must also be pointed out that there is a difference between the Civil Procedure Code and the Indian Arbitration Act, because the Code distinctly provides for remitting all or some of the matters referred to arbitration for reconsideration by the arbitrator. So does S. 10 of the English Arbitration Act of 1889. But under S. 13 of the Indian Arbitration Act of 1899, the Court must, I think, remit the award as a whole, I do not think I have any jurisdiction to remit only a part of the award for reconsideration. If I remit the award, it must be first set aside, and the whole proceedings must be re-opened, but the Courts are as a rule not inclined to open up arbitration proceedings unless the requirements of justice warrant such remission. The return of 1250 'Malbari Kathis' instead of 'Batwani Bamboos' is not to my mind a matter on which I should remit the whole award for the reconsideration of the arbitrator, especially in view of the arbitrator's statement that he took them to be one and the same. I am also aware of the danger pointed out by the Master of Rolls in 33 Beav 213[8] that notwithstanding the honesty and bona fides of an arbitrator (p. 217):

> . . . . it is impossible, where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to favour one side, and a disposition to make it appear that the objections to the award were useless, and that the sending it back was productive of no good.

It is not however on that ground that I am against the remission. The arbitrator is an educated man, and there is no charge of partiality or bias against him. I am not prepared to remit the award on only a small matter, and make the parties incur further unnecessary costs. In the result, the petition must be dismissed.

I have heard counsel on the question of costs. I have been referred to S. 17, Arbitration Act, which provides that an order made by the Court under this Act may be made on such terms as to costs or otherwise as the Court thinks fit. The question of costs, as in all other proceedings generally, is in the discretion of the Court, but the discretion has to be judicially exercised. As a rule, costs follow the event, and there must be some special circumstances which take the matter out of that rule. I agree with counsel for the respondents that the main question here was one of misconduct which would vitiate the award under S. 14 of the Act. On that the petitioner has failed, and I must therefore dismiss the petition with costs. Petition dismissed with costs. In my opinion this was a fit case for engaging two counsel, and I certify accordingly.

S.C./D.S. *Petition dismissed.*

A. I. R. 1937 Bombay 417

BARLEE AND TYABJI, JJ.

Pallonjee Eduljee & Sons — Plaintiffs — Appellants.

v.

Lonavala City Municipality — Defendant — Respondent.

First Appeal No. 143 of 1933, Decided on 9th October 1936 and 11th January 1937, from decision of First Class Sub-Judge, Poona, in C. S. No. 241 of 1932.

(a) General Clauses Act (1897), S. 3 (39)—Scope—'Person' includes Municipality.

The definition of the word 'person' in S. 3 (39), General Clauses Act, includes a Municipality, which is a body of persons incorporated. [P 419 C 2]

(b) Contract Act (1872), S. 70—Applicability — S. 70 is not repealed or altered by Ss. 48 and 49, Bombay Municipal Boroughs Act—Contract not enforceable for not complying with provisions of Ss. 48 and 49 — Applicability of S. 70 is not excluded thereby.

Even though S. 48, Bombay Municipal Boroughs Act, has empowered the Bombay Legislature to alter or amend S. 70, Contract Act, it has not done so directly or even by necessary implication, for S. 49, Bombay Municipal Boroughs Act, and S. 70, Contract Act, do not seem pari materia. The former section lays down the requirements of a valid contract; the latter deals with the situation which arises when one of those requirements has not been fulfilled. [P 422 C 2]

The applicability of S. 70, Contract Act, cannot therefore be excluded by the mere fact that there is no enforceable contract by reason of the requirements of Ss. 48 and 49, Bombay Municipal Boroughs Act not having been followed. [P 419 C 2]

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[8] *Re* Tidswell, (1863) 33 Beav 213=10 Jur (N S) 143.

(c) Contract Act (1872), S. 70—S. 70 merely directs Court to consider plaintiff as entitled to compensation where relation laid down in that section exists—S. 70 does not empower Court to determine what relationship entitles plaintiff to compensation.

The relation under S. 70, Contract Act, is created by the fact that one person lawfully does something for another or delivers anything to him and by the fact that the other person enjoys the benefit thereof; and when this relation arises, the liability to make compensation or to restore the thing delivered arises as a statutory liability not arising out of contract. The very purpose of the section is to lay down in what circumstances such a relation must be taken to exist, viz. in what circumstances the plaintiff may claim that his act has directly created or reasonably justified the inference that he is entitled to compensation. The section does not empower the Court under guise of interpreting the harmless, necessary words 'lawfully' to determine according to the Court's own notions of justice what relations must entitle the plaintiff to compensation, and then say that if those relations do not exist, S. 70 does not come into operation : the section does not empower the Court to hold that no act shall be deemed to be lawful unless compensation is (according to the Court's own notions) due for doing it. [P 419 C 2; P 420 C 1, 2]

(d) Contract Act (1872), S. 70—Compensation—Basis of compensation under S. 70 is not same as on contractual rights of parties—It should be in proportion to benefit enjoyed by party for whom anything is done and to whom anything is delivered.

The basis of the compensation under S. 70, Contract Act, is not the same as on contractual rights. The latter would be on the footing of the contract between the parties. The basis of the compensation under S. 70 should be in proportion to the benefit enjoyed by the party for whom anything is done and to whom anything is delivered ; and appropriate compensation is to be awarded mainly from that aspect. [P 421 C 1]

(e) Contract Act (1872), Ss. 55 and 74—Applicability — Plaintiff depositing certain amount in pursuance of contract to erect buildings on condition of forfeiture of deposit if work not completed within stipulated period — Deposit is stipulation by way of penalty—S. 55 indirectly applies to such case—Defendant not claiming damages under S. 55 — Plaintiff is entitled to return of deposit after completion of contract.

The plaintiff, a building contractor, entered into a contract with a Municipality to erect certain buildings for the said Municipality. As per terms of the contract the plaintiff deposited with the Municipality a sum of Rs. 1,000 on condition that if the work was not completed within a period of three months, the deposit was liable to be forfeited. On the completion of the contract, the plaintiff claimed the return of the deposit to him. The defendant Municipality contended that as the contract was not being completed within the stipulated period, they were entitled to forfeit the same :

Held : that the deposit ought to be considered, in view of the terms of the contract, a stipulation by way of penalty within the meaning of S. 74, Contract Act. On that stipulation, the defendant was not entitled in accordance with S. 74, to enforce the penalty in terms, but to receive from the plaintiff reasonable amount of compensation not exceeding the penalty, for his committing breach of the contract. [P 421 C 1]

Held further : that S. 55, Contract Act, was indirectly applicable to the case. The deposit was not only in pursuance of a stipulation by way of penalty, but it was in respect of a penalty arising out of a failure to fulfil a term of the contract which fell under S. 55—a promise to complete the work within a stipulated period, which could not as a rule be said to be a term forming the essence of contract, inasmuch as the Municipality did not claim compensation in respect of the penalty clause under S. 55. Therefore the plaintiff was entitled to the return of his deposit. [P 421 C 2]

H. C. Coyajee, *S. G. Chitale* and *G. R. Chitale* — for Appellants.

G. N. Thakor and *V. D. Limaye* — for Respondent.

Tyabji, J.— This appeal arises out of a suit brought by certain building contractors and sanitary engineers primarily on the basis of a contract between themselves and the defendant, the Lonavala Municipality. The plaintiffs allege that it was agreed that they should put up a new vegetable market, a new beef market and a slaughter-house for the defendant Municipality. The contract alleged by the plaintiffs is based on rates. It is not on the basis of a lump sum payable for the works to the contractor. An alternative to the suit based on contract is that contained in para. 15 of the plaint, which may be referred to shortly as a claim on the basis of S. 70, Contract Act.

Dealing first with the claim on the basis of the contract between the Municipality and the plaintiffs (Ex. 32), it seems clear that the contract referred only to that part of the works done by the plaintiffs which was styled the vegetable market and that assuming that there were any other provisions in the contract with reference to works not falling within the description of a new vegetable market, the provisions of Ss. 48 and 49, Bombay Municipal Boroughs Act 1925, were not followed. These sections require the sanction of the Municipality by a resolution passed at a general meeting in the case of a contract involving expenditure not covered by a budget grant : and every contract for the execution of any work involving expenditure exceeding Rs. 500 shall be in writing and shall be sealed with the common seal of the Muncipality, and shall specify the work to be done or the materials or goods to be supplied, as the case may be, the price to be paid, and other particulars. Some attempt was made to bring the contract (Ex. 32) under the provisions of S. 48 (3) (b) and S. 49 (1), Proviso (b), the effect of which I have just stated : but the effort utterly failed, and so far as the claim of the plaintiffs is based on the work done in respect of the beef market and the slaughter-house, the plaintiffs had to fall back upon the provisions of Ss. 65 and 70, Contract Act.

Section 65, Contract Act, again proceeds on the basis of there having been a contract, so that the plaintiffs cannot claim its benefit. But the other section relied upon—S. 70—applies—unless the argument on behalf of the respondents (originally defendants) can be accepted.

Section 70 provides for a case where (1) a person lawfully does anything for another person or delivers anything to him, (2) the second requirement of the section is that the lawful act or delivery shall not have been intended to be done gratuitously, and (3) the third is that the other person enjoys the benefit thereof. When these three conditions are satisfied, then under S. 70, the latter person is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. The compensation to be made is in respect of the benefit enjoyed by the second person.

The argument in connexion with S. 70 addressed to us on behalf of the defendants was that the act done by the plaintiffs cannot be considered to be a lawful act, inasmuch as it was done in contravention of Ss. 48 and 49, Bombay Municipal Boroughs Act, and that in any case Ss. 48 and 49 must override the provisions of S. 70, Contract Act. *Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa*[1] and similar cases were relied upon for the proposition that when a corporation is restricted by statute from entering into contracts to a particular effect unless certain formalities are observed, a corresponding liability ought not to be allowed to arise apart from a contract satisfying the statute : to do so would be rendering nugatory the statutory provisions and disregarding the requirements of the Legislature.

The case in India however stands on a different footing. We have here such sections as Ss. 48 and 49 of Bombay Municipal Boroughs Act — provisions as to how contracts may be made. On the other hand, S. 70, Contract Act, contains a provision for binding a person to make compensation under conditions which do not postulate a contract. The expression "person" under the General Clauses Act, S. 3 (39), includes "any company or association or body of individuals, whether incorporated or not." A Municipality is a body of persons incorporated and must consequently be included in the term "person." The applicability of S. 70, Contract Act, cannot therefore be excluded by the fact that there is no enforceable contract (or to use the language of the Municipal Bouroughs Act that there is not any contract binding on the Municipality), by reason of the requirements of Ss. 48 and 49 not having been followed. S. 70 does not depend upon the existence of a contract binding on the parties and does not provide for contractual liabilities. There have been many cases on S. 70 in the Indian High Courts, but we are particularly concerned with those that refer to the apparent conflict between such a provision as is contained in Ss. 48 and 49, Bombay Municipal Boroughs Act, and the Contract Act, S. 70. There need not necessarily be any conflict. There may be cases where there is no contract and S. 70 may be given effect to, apart from the provisions of Ss. 48 and 49, Bombay Municipal Boroughs Act. The English cases are distinguishable, since there is in India a statutory provision creating a liability arising not out of contract but out of relations resembling those created by contract. The relation under S. 70 is created by the fact that one person lawfully does something for another or delivers anything to him and by the fact that the other person enjoys the benefit thereof : and when this relation arises, the liability to make compensation or to restore the thing delivered arises as a statutory liability not arising out of contract.

The observation of Straight, J. in *Chedi Lal* v. *Bhagwan Das*[2] (p. 243) :

> I presume that the Legislature intended something when it used the word 'lawful' and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done,

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[1] (1883) 8 A C 517=52 L J Q B 713.

[2] (1889) 11 All 234=1889 A W N 67.

has been relied upon, especially as it was cited and apparently followed in *Punjabai* v. *Bhagwandas.*[3] But with all respect the observation throws no light on the subject. It reads into the word "lawfully" the existence of a relation before the act was done, viz. such a relation as either—(1) directly creates, or (2) by implication reasonably justifies the inference that by doing some act the plaintiff is entitled to look for compensation to the defendant.

But the very purpose of the section is to lay down in what circumstances such a relation must be taken to exist, viz. in what circumstances the plaintiff may claim that his act has directly created or reasonably justified the inference that he is entitled to compensation.

In the result, Straight J.'s observation may be read in two ways. It is harmless if it is taken to mean that in certain circumstances the plaintiff is entitled to compensation—and that the circumstances must be taken from the section—that in the circumstances stated in the section (under three heads), it may be assumed, unless the contrary is proved, that the one person held such a relation to the other as either directly to create, or by implication reasonably to justify, the inference that for the act done, the first named person was entitled to look for compensation to the person for whom the act was done. But, in fact, giving to the word "lawfully" the significance that Straight, J. wishes to give it, renders the section tautologous and futile : for according to the suggested interpretation, the section provides that where a person holds such a relation to another as to create or justify an inference that by some act done by him for another person compensation is payable, in such a case if he does some act, compensation shall be payable to him, viz. where compensation is payable, it shall be payable.

The observations will, on the other hand, be misleading if under guise of giving a meaning to the word "lawfully" the Court proceeds to determine, according to its own light and inclination, and not according to the terms of S. 70, whether the plaintiff already stood, before doing the act, in such a relation that he became entitled to compensation. What the section does is to direct the Court to consider the plaintiff to be entitled to compensation where the relation laid down in the section has arisen. The section does not empower the Court under guise of interpreting the harmless, necessary word "lawfully" (which occurs in the course of one of three considerations laid down in the section) to determine according to the Court's own notions of justice what relations must entitle the plaintiff to compensation, and then say that if those relations do not exist, S. 70 does not come into operation : the section does not empower the Court to hold that no act shall be deemed to be lawful unless compensation is (according to the Court's own notions) due for doing it. If the word "lawfully" is given its usual ordinarily understood meaning, there is no doubt that the acts, for doing which compensation is claimed, were done lawfully.

A question was raised before us that the plaint proceeds on the basis of the suit being for the purpose of enforcing specific performance of the contract, and that S. 70 was not relied upon, and that a suit on S. 70 is emphatically on a different basis from one based on the contract. Some of the matters to which I have referred support the same view, but on the whole it seems to me (as held by the learned Judge) that para. 15 of the plaint avers all the facts the existence of which will enable the plaintiff to rely upon S 70, though there was no specific issue referring to S. 70, and though the questions that have to be considered and decided on S. 70 are of a different nature from those that arose when a claim is made on the basis of a contract. Detailed issues would no doubt be required on the basis of S. 70, but many of them have, in the course of the trial, been already considered and answered ; and it is unnecessary to have those issues tried over again. The points have been argued, and there are materials sufficient to hold that the acts relied upon for the purpose of S. 70 by the plaintiffs were lawfully done : that there was a delivery of the completed works on the part of the plaintiffs to the defendant ; that there was no intention to deliver them gratuitously : and that the Municipality enjoyed the benefit of the works.

But we have no definite finding with reference to the compensation that under these circumstances the Municipality must make to the plaintiffs for the works put up on the municipal sites, known as the beef market and the slaughter-house. The basis of the compensation under S. 70 would, it seems plain, not be the same as on contractual rights. The latter would be on the footing of the contract between the parties. The basis of the compensation under S. 70 would be in proportion to the benefit enjoyed by the Municipality and appropriate compensation is to be awarded mainly from that aspect, and perhaps it may be stated that it should be on a footing that would not include any such profits to the plaintiffs as they might be entitled to claim on the basis of a contract. It will be necessary therefore to require a finding from the lower Court on the question as to the amount of the compensation that the plaintiffs are entitled to, on the basis of S. 70, Contract Act, in respect of the beef market and the slaughter-house put up by the plaintiffs on the municipal sites.

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[3] A I R 1929 Bom 89=117 I C 518 = 53 Bom 309=31 Bom L R 88.

There is one other point that was argued before us and with which I must deal. A sum of Rs. 1,000 had been deposited by the plaintiffs in respect of the contract entered into by them with the Municipality. The learned Judge has held that the deposit was on the terms that if the works were not completed within three months, it should be forfeited ; and that as the works were not completed within three months, the defendants were entitled to forfeit the deposit. In my opinion, the learned Judge has not considered the question in the correct light. The deposit ought to be considered on the terms on which it was made, as resulting from a stipulation by way of penalty within the terms of the Contract Act, S. 74. On that stipulation, the defendants were not entitled, in accordance with S. 74, to enforce the penalty in terms, but to receive from the plaintiffs who had broken the contract, reasonable compensation not exceeding the amount of the penalty stipulated for. The Contract Act, S. 55, also bears on the case. That section provides for one specific kind of promise—where a certain thing is promised to be done at or before a specified time. In regard to the performance of such a promise, a special rule is laid down : that (unlike the terms of contracts generally) the Court is not to enforce such a promise in accordance with its terms, but is to enforce it subject to the provisions of S. 55 ; and the provisions of S. 55 are that, as a rule a promise fixing the time within which the promisor is bound to do the thing promised, shall not be considered as a term forming the essence of the contract : and that for the non-performance of such a term no compensation shall be allowed unless the conditions stated in S. 55 are satisfied. As I have said, S. 55 has an indirect bearing on the question of the deposit under the contract to which I have referred. The deposit was not only in pursuance of a stipulation by way of penalty, but it was in respect of a penalty arising out of a failure to fulfil a term of the contract which fell under S. 55—a promise to do something within a stated time. In order therefore to determine the terms in accordance with which the stipulation for the forfeiture of the deposit should be given effect to, in other words, to construe a clause inflicting a penalty for non-fulfilment of an agreement within a stipulated period of time—the requirements both of Ss. 74 and 55 must be considered. In any case there are no materials placed before the Court on the basis of which the defendants became entitled to enforce the penalty to any extent, or to claim compensation for damages or loss arising out of the failure to perform the stipulation. If S. 55 is given effect to with reference to this penalty, damages might have been claimed by the defendants in respect of this penalty clause, but no such claim was made. In my opinion, therefore, the plaintiffs are entitled to the return of the deposit. It is unnecessary to disturb the order of costs made by the lower Court, but the appellants will be entitled to the costs of the appeal.

It has been stated to us that it may not be necessary to require the lower Court to return findings on the issues that I have indicated, as the parties may settle the amount of compensation payable. It would certainly be advisable that they should do so. The case will be put on Board in the first week after the vacation.

Barlee, J.—I agree. In this case there is no contract between the Municipality and the plaintiffs for the construction of the beef market and the slaughter-house. Contracts of a Municipality must be in writing and the Municipality cannot be held bound by oral contracts entered into by their President. On the other hand, S. 70, Contract Act, applies in terms. It has been objected that the plaintiff was not acting lawfully. With this I cannot agree. He was constructing the vegetable market under a contract and he was directed by the President to construct, in addition, other buildings for a beef market and a slaughter-house, and he did so. He may or may not have known the requirements of the Bombay Municipal Boroughts Act, but, even if he knew them, he must have anticipated that the necessary sanction would be obtained and the necessary written contract completed. He acted with perfect bona fides. Obviously he did not do the act gratuitously.

Mr. Thakor has argued that the Municipality got no benefit from the buildings. They cannot restore them since they have been put up on municipal ground. If they got no benefit then of course they would not have to pay compensation. This is a question which does not arise at this stage. It will be a question for inquiry whether any benefit was received. Prima facie as they require a slaughter-house and a beef market and as they have taken these buildings over and are using them, they must have got some benefit. The learned counsel put forward a hypothetical case that a man ought not to be called upon to pay for any building which a stranger chooses to put up on his land however expensive it may be. This of course is perfectly correct. But the argument does not apply to the facts of this case. If the buildings are larger than the defendants' requirement, then that can be taken into consideration when the question of benefit is enquired into.

The principal point in this case—and a point of very great interest—is whether S. 70 applies at all to Municipalities. It is argued on the strength of English cases cited in Halsbury, Vol. 8, p. 359, para. 805, and in particular *Young & Co.* v. *Mayor, and Corporation of Royal Leamington Spa*,[1] that the equitable principle of compensation cannot be applied where statute bars the way. But in India, where we have no conflict between equity and statute, and the conflict if any is between statutes, it does not appear that the English case-law on the subject ought to govern our decision. We have to decide whether S. 70, Contract Act, is to be read subject to the provincial enactment embodied in the Bombay Municipal Boroughs Act which gives powers to Municipalities to enter into contracts. A local legislature has power under S. 80-A, Government of India Act to alter or repeal Acts of the Central Legislature, provided the previous sanction of the Governor-General in Council is obtained, and the previous sanction of the Governor-General in Council was obtained in this case. Therefore the local legislature was competent by S. 48 to alter or amend S. 70, Contract Act. But they did not do so directly and I cannot find that they did so by necessary implication for the two sections, S. 49, Bombay Municipal Boroughs Act, and S. 70, Contract Act, do not seem to be in pari materia. The former section lays down the requirements of a valid contract; the latter deals with the situation which arises when one of those requirements has not been fulfilled. I cannot see that the former can be looked on as an exception to the other, even though it may have the effect of imposing liability on a Municipality, for such liability is in no way contractual. As my learned brother has pointed out, the rate-payers are protected by the provision that they can only be held liable to pay for such benefits as they have received or to restore something to which they have no claim. I think we can safely follow the case in *Zulaing* v. *Yamethin District Council*,[4] and the other Indian cases that were followed by the learned Judges who decided that case, such as *Mohamed Ebrahim Molla* v. *Commissioners for the Port of Chittagang*,[5] *Municipal Committee, Gujranwala* v. *Fazal Din*,[6] *Secy. of State* v. *G. T. Sarin & Co.*,[7] and our Bombay case in *Abaji Sitaram* v. *Trimbak Municipality*.[8] I agree, therefore, with the order proposed by my learned brother.

Barlee, J.—(*11th January 1937.*)—The attempt to settle the amount of compensation has failed. In consequence, the order proposed by my learned brother in his judgment, dated 9th October 1936, must be carried out, that is, the learned Subordinate Judge should ascertain the amount of the compensation that the plaintiffs are entitled to, on the basis of S. 70, Contract Act, in respect of the beef market and the slaughter-house put up by the plaintiffs on the municipal sites. Finding to be returned within two months.

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[4] A I R 1932 Rang 176=140 I C 737=10 Rang 522.

[5] A I R 1927 Cal 465=103 I C 2=54 Cal 189.

[6] A I R 1929 Lah 742=121 I C 187=11 Lah 121=31 P L R 403.

[7] A I R 1930 Lah 364=120 I C 615=11 Lah 375=31 P L R 765.

[8] (1903) 28 Bom 66=5 Bom L R 689.

A.L./R.K. *Appeal allowed.*

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RANGNEKAR, J.

In re *Katni Cement and Industrial Co. Ltd.*

I. C. No. 25 of 1936, Decided on 16th October 1936.

Companies Act (1913), Ss. 153 and 213—Distinction between — Scheme by Company for transfer of its undertaking to new concern formed by amalgamation of several companies carrying on like business and for re-organization of rights of and distribution of assets among different classes of share-holders—Court has jurisdiction under S. 153 to sanction such scheme even if it involves winding up and acts which would be ultra vires the Company—Duty of Court in sanctioning scheme mentioned.

The machinery provided by S. 153, Companies Act, is available where there is and where there is not a winding up in progress. S. 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. [P 427 C 2; P 428 C 1]

A wide interpretation has to be placed upon S. 153. A scheme prepared by a company for the transfer of its undertaking to a new concern formed by the amalgamation of several companies carrying on like business, and for the re-organization of the rights of and distribution of assets among the different classes of share-holders, in the event of the company being wound up after the amalgamation, can be sanctioned by the Court under S. 153, even if the scheme may involve winding up and acts which would be ultra vires the company. But this rule is subject to the limitation that if the Companies Act contains express provision enabling the doing of any act in a particular way, the provisions of the enabling section and not those of S. 153 must be followed. [P 428 C 1, 2]

In sanctioning the scheme, what the Court has to see is whether the scheme is reasonable and bona fide and accepted by a very large majority of all classes of share-holders acting honestly. The test of reasonable scheme is whether it is regarded by reasonable people conversant with the subject as beneficial to those on both sides who are making it. [P 430 C 2; P 431 C 1]

Before sanctioning the scheme the Court may impose certain conditions upon the company for making some provision for the dissentients. The Court however does not necessarily make any provision in favour of dissentients, if it is satisfied that the scheme is reasonable and fair and in the interest of the general body of share-holders. In any case under modern practice, such a provision is not a *sine qua non* to sanctioning the scheme if it is reasonable: *In re Palace Hotel Ltd.*, *(1912) 2 Ch 438*; *In re Scheweppes Ltd.*, *(1914) 1 Ch 322*; *In re J. A. Nordberg Ltd.*, *(1915) 2 Ch 439*, *Foll.*; *Bisgood* v. *Henderson's Transvaal Estates Ltd.*, *(1908) 1 Ch 743*, *Disting.* [P 431 C 1, 2]

F. J. Coltman, *Sir Jamshed Kanga* and *V. F. Taraporewala* — for Petitioners.

M. C. Setalvad — for dissenting and neutral deferred share-holders.

N. P. Engineer, *B. T. Desai* and *D. D. Sabnis* — for some other deferred share-holders.

Order.— The Katni Cement and Industrial Company, Ltd. was incorporated under the Companies Act, 1882, on 13th August 1912, with a nominal capital of rupees twenty lacs. The capital of the Company was increased in 1919 and the present capital is rupees thirty lacs, divided into 5,000 first preference shares of Rs. 100 each, 10,000 second preference shares of Rs. 100 each, 14,376 ordinary shares of Rs. 100 each, and 1,560 deferred shares of Rs. 40 each.

The first preference shares were issued in terms of cl. 7 (a) of the memorandum of association of the company and entitled the holders to a fixed cumulative preferential dividend at the rate of seven per cent. per annum on the capital for the time being paid up thereon and the right in a winding up to payment of capital in priority to the ordinary and deferred shares. The second preference shareholders were entitled to a fixed cumulative preferential dividend at the rate of seven per cent. per annum on the capital for the time being paid up thereon free of income-tax and the right in a winding up to payment of capital after payment to the holders of the first preference shares. The holders of ordinary shares, under cl. 7 (b) of the memorandum of association of the Company, were entitled to a non-cumulative dividend at the rate of eight per cent. per annum on the capital for the time being paid up thereon. The deferred share-holders, under cl. 7 (c) of the memorandum of association of the Company, were entitled to a non-cumulative dividend at the rate of twenty-five per cent. per annum on the capital for the time being paid up thereon. Then it was provided by cl. 7 (e) of the memorandum of association that any further profits which it might be determined to distribute by way of dividends should be divided between the holders of ordinary and deferred shares—fifty per cent. to the former and fifty per cent. to the latter. By cl. 7 (g) of the memorandum of association it was provided that, subject to the rights of the holders of the first preference shares and subject to the rights of the holders of the second preference shares, any surplus assets in a winding up after paying off the capital paid up on the ordinary shares and the deferred shares rateably were to be distributed between the ordinary and deferred share-holders in the proportion of forty per cent. and sixty per cent. respectively.

As one of the objects of the Company, cl. 3 (26) of the memorandum of association reads as follows :

> To sell and in any other manner deal with or dispose of the undertaking or property of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures and other securities of any other company having objects altogether or in part similar to those of this Company.

It is clear on the affidavits filed in the case that the Company did not apparently flourish during the early part of its career. There were several companies carrying on the same kind of business in India, and owing to keen competition among them the condition of the cement industry as a whole was deplorable and this Company along with some others had sometimes even to incur losses. In 1926 some of these companies entered into what is called a pooling arrangement, which improved matters. Not only the internal competition was reduced, but the prices were stabilized as a result of the arrangement, and confidence restored in the industry as a whole. This went on till 1930, when a further progressive step was taken by the companies manufacturing cement. This was the establishment of what is called the Cement Marketing Company. This company took over the control of the sales and distribution of the cement manufactured by the various companies, with the exception of two companies, one of which, however, subsequently became a member of the Cement Marketing Company and the other entered into an agreement by which prices were fixed and maintained by mutual consent. The arrangement then adopted was to allot a certain quota to the members of the Cement Marketing Company; and this, it is clear, resulted in improving the position of the various companies. Each company was given a rated capacity representing as far as possible its normal production. The Marketing Company allocated the total available business each year to the companies in the proportion that their rated capacity bore to the total rated tonnage of all the member companies. This led to considerable co-operation as regards the manufacture and sale of cement throughout the country resulting in increased consumption. It was, however, found that even this arrangement was capable of being improved upon. There were several difficulties which required serious consideration of those who were interested in the cement industry in this country. Not only the demand for cement increased since 1930, but the rated capacity, which was taken as the basis for allotting quotas to the members of the Cement Marketing Co. was found to be inadequate, and it was felt that the industry was capable of expansion and it was possible to have new factories erected in different places where there was a greater demand than the companies were able to cope with, so as to reduce the cost of transport and in the result to reduce the selling prices of the commodity. It was considered desirable that there should be a merger of all these companies so as to consolidate the whole business of the various companies manufacturing cement, not only as regards the manufacture and selling prices, but also in regard to the erection of more factories wherever it was considered to be necessary to do so together with better economical distribution. It seems that this merger scheme was talked about and discussed in the market long before October 1935. The directors of this Company naturally were interested in this proposed scheme. The merits of the scheme were very seriously considered by the respective boards of the various companies. The scheme, it seems, owes its origin to the late Mr. F. E. Dinshaw, and the general outlines of the scheme apparently were prepared by him. The main idea was to float a merger company on business lines, consisting of some ten companies carrying on the business of manufacturing cement throughout this country, who were to enter into an agreement. It was proposed that each of the companies should transfer its business and undertaking to a combined company known as the Associated Cement Companies, Limited. The consideration for such transfer was to be Rs. 60 per ton of what is described as the rated capacity of each company, subject, of course, to other contributions to be made subsequently. For this purpose, the capacity of each of these companies was carefully calculated, and in the case of the petitioners, the rated capacity was 87,000 tons a year, and the price to be paid by the Associated Cement Companies, Limited, was 52.2 lacs of rupees, which was to be satisfied by the issue of fully paid shares in the Associated Cement Companies Ltd. of an equivalent nominal value. The price fixed at Rs. 60 per ton of its rated capacity was not to include book debts or cash outstandings, securities, funds and investments, and stocks of cement, etc., of each company; and each of the companies was entitled to retain its cash funds, securities, outstandings and investments as well as the stock in hand for the benefit of its own shareholders. The proposed agreement further provided that in addition to the sale of the undertaking and business abovementioned, each of the companies had to subscribe for shares in the Associated Cement Companies, Ltd., of the nominal value equivalent to Rs. 10 per ton of its rated capacity, so that in the case of the petitioners, the Company had to subscribe for shares of the nominal amount of Rs. 8.7 lacs in the Associated Cement Companies Ltd. and pay for the same in cash. The cement companies also agreed to sell to the Associated Cement Companies Ltd., their respective holdings in Burma Cement Co. Ltd., which was one of the companies which had refused to join, at the nominal fully paid price of the shares. The result of the scheme was practically to bring the working of that company under the control of the members of the Associated Cement Companies Ltd. There were various other terms of the proposed agreement, to which it is not necessary to refer.

The question, then, which arose before the directors of the petitioning Company was, whether they should join the merger; and as they say in their petition they naturally anticipated that after the sale of the undertaking of the Company, although it was not essential to and was no part of the scheme, it was probable that the Company would be wound up to facilitate a distribution amongst share-holders of the assets of the Company which were far in excess of the capital of the Company, and that upon such winding up, the amount payable by way of return of capital to the first and second preference share-holders in terms of the memorandum and articles of association of the Company would be far below the present market value of such shares, and if invested by these shareholders would not produce the same income to them that they were entitled to get by way of dividends. It is clear therefore that if the scheme had to go through, the concurrence of the holders of the preference shares was essential and it was but fair to provide that in the event of liquidation, these share-holders should receive a larger sum than the par value of the shares. Similarly, the claims of the holders of ordinary shares had also to be considered. This was recognized by the general body of the share-holders, who it is clear also realized that the proposed sale was in the interest of the Company. It was also recognized that the scheme would certainly result in a considerable benefit to the ordinary and deferred shareholders of the company. The ordinary shareholders also were practically in the same position, because the prices of the ordinary shares were much above par. The directors therefore realized, it seems to me, as most of the shareholders seem to have realized, that the scheme of distribution on a winding up had in some respects to be varied if the scheme of the merger was to be put through.

Accordingly, the directors prepared a scheme of arrangement, which is now submitted to the Court for approval under S. 153, Companies Act. The scheme, shortly put, was that in the event of the sale of the undertaking and assets of the Company to the merger Company in a winding up of the Company, whether voluntary or compulsory, each holder of a first preference share was to be paid Rs. 143 in full satisfaction of the capital paid on it, a holder of a second preference share, Rs. 150, and for dividing the surplus assets each deferred share was to be deemed to be equivalent in value to six ordinary shares. It appears from the affidavit of Sir Jehangir Boman-Behram, Chairman of the Board of Directors of the Company, that on 9th May 1936, the directors issued a circular letter to all the shareholders of the Company inviting the ordinary shareholders to meet the directors at an informal meeting on 22nd May 1936, the deferred shareholders on 23rd May 1936, and the first and second preference shareholders on 25th May 1936, in order that the directors might discuss the scheme with the different classes of shareholders to find out whether the shareholders would approve of the scheme. It appears from the circular letter that the market prices of the different classes of shares of the Company were as follows:

1st Preference	...	Rs.	138-12-0
2nd Preference	...	"	146-14-0
Ordinary ...	...	"	366- 0 -3
Deferred ...	...	"	2440- 0 -0

These meetings accordingly were held, and each class of share-holders appointed four representatives to meet the directors and consider in greater detail whether the proposed amalgamation would be beneficial to the company as a whole, and, if so, whether there should be a re-organization of the rights of the different classes of share-holders. Ten meetings were held by the directors of the Company with these representatives. Further informal meetings of all classes of share-holders were held, and it seems clear to me that the scheme was approved by the bulk of the share-holders of the several classes present at such meetings. Another circular letter was issued on 17th June 1936 to all the share-holders of the company giving more detailed information with regard to the scheme of amalgamation and the benefits expected to be derived therefrom. I am satisfied from the affidavits that the share-holders were taken into complete confidence by the directors; the scheme was very carefully submitted to them in considerable detail, and the advantages were pointed out. On 1st August 1936, the directors decided to call an extraordinary general meeting to take place on 19th August 1936. Notice was issued to all the share-holders, and it was proposed that a resolution authorizing the sale of the undertaking of the Company to the Associated Cement Companies, Ltd., and for re-organization of the rights of and distribution of assets among the different classes of share-holders in the event of the Company being wound up after the amalgamation, would be submitted. The notice with regard to the meeting with a copy of the resolution was circulated to the share-holders in the form of a circular letter.

The affidavit of Haridas Gopaldas, who is the secretary of the petitioners, shows that on 19th August 1936, at an extraordinary general meeting of the petitioners duly convened and held at the registered office of the petitioners, a resolution sanctioning the sale of the works and undertaking of the petitioners was passed by a large majority of the share-holders present. Ten share-holders holding in the aggregate 49 shares, voted against the resolution. In view of the resolution having been carried on a show of hands as aforesaid, a poll was not demanded, but the number of shares held by all the share-holders present and entitled to vote at the meeting was 3484, whilst proxies had been lodged with the petitioners in favour of the resolution by holders of 9254 shares.

In these circumstances, the petitioners took out a Chamber Summons, on which it was ordered by B. J. Wadia, J. on 7th August 1936, that the Company should convene meetings of the four classes of share-holders to be held at the registered office of the Company for the purpose of considering and, if thought fit, approving with or without modification the scheme of arrangement. The learned Judge also gave certain directions as to the convening of the meetings, as to the deposit of proxies, and as to who was to be the chairman of the meetings. Accordingly, in pursuance of the order made, on 28th August 1936, a meeting of the holders of the first preference shares was held at 3 P. M., a meeting of the holders of the second preference shares was held on the same day at 5 P. M., and on 29th August 1936, a meeting of the holders of the ordinary shares was held at 2 P. M., and of the holders of the deferred shares on the same day at 4 P. M. The first meeting, that is to say, the meeting of the holders of the first preference shares was attended personally or by proxy by 177 shareholders holding a total of 1803 first preference shares of Rs. 100 each, and the scheme was approved of by all the shareholders present, excepting one who held ten first preference shares. That exactly was the position with regard to the meeting of the holders of the second preference shares. There also the same gentleman dissented; all the others voted for the scheme. The meeting was attended by 203 share-holders holding a total of 5843 second preference shares of Rs. 100 each. As regards the ordinary share-holders, the meeting was attended by 272 shareholders holding a total of 5533 ordinary shares, and excepting the same dissentient, all the others present approved of the scheme and agreed to it. The meeting of the holders of the deferred shares was held on 29th August 1936, and was attended personally or by proxy by 223 share-holders holding a total of 913 deferred shares valued at Rs. 40 each. The resolution, which was read and explained by the chairman to the meeting, was accepted by all the share-holders with the exception of 29 dissentients holding an aggregate of 49 shares.

In these circumstances, the company has now presented a petition for sanctioning the scheme under S. 153, Companies Act. The petition is opposed (1) by Gordhandas Bhagwandas and about 25 other deferred share-holders who were present at the meeting and are represented by Mr. Setalvad, some of whom had dissented and the rest had not voted either one way or the other ; (2) by one deferred share-holder, Laxmichand Damji, who is represented by Mr. B. T. Desai; (3) by U. S. Desai and 19 other deferred share-holders, who were present at the meeting and voted for the resolution but now recant ; (4) by Pranjivan Madhavji and two others, who are deferred share-holders, and it is not clear whether they were present or not ; (5) by one deferred share-holder, Pavri ; and (6) by the holder of one deferred share, Matani, who appeared after the arguments were closed. Almost all of these share-holders have become share-holders of the Company after the scheme as to the merger of the cement companies came to be widely known in the market ; and it is suggested that these persons' opposition is not so disinterested as would appear to be at first sight. There seems to be some force in this contention, though it is not necessary for me to express any opinion on it. The case on behalf of these opponents was argued elaborately by Mr. Setalvad, who was supported by the other learned counsel.

The first ground on which the petition is opposed is that this petition is misconceived and incompetent. This is based upon the contention that as the scheme involves a sale of the undertaking of the Company and distribution of the assets of the company amongst the share-holders, which can only be done by a petition under S. 213, Companies Act, the petition under S. 153 is misconceived. It is further contended that the scheme involves a winding up of the Company, and that the directors actually propose to wind up the company, and therefore the Court has no jurisdiction to sanction it under S. 153. It is further contended that the resolution is ultra vires the company as it amounts to altering the contractual rights of the deferred share-holders. Then it is argued that the scheme should not be sanctioned as there is no provision made for safeguarding the rights of the dissentients, and the Court will usually insist upon such a provision being made before sanctioning a scheme of this nature. The next ground is that the meeting was not fair as the shareholders were prevented from attending it because an influential director of the Company or a bullion broker represented that the company promised a benefit to the shareholders who did not oppose the scheme. Lastly, it is contended that the scheme on the merits is not fair and reasonable, and there is no real majority in favour of it, and that the scheme is not fair as it seeks to enrich the preference and ordinary shareholders at the cost of the deferred shareholders.

The petition, as stated, is presented under S. 153, which is in these terms:

> (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members, or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.
>
> (3) In this section the expression 'company' means any company liable to be wound up under this Act.

This section corresponds to S. 120 of the (English) Companies (Consolidation) Act, 1908, and to S. 153 of the English Companies Act, 1929. The plain language of S. 153 of our Act clearly shows that the machinery provided by the section is available where there is and where there is not a winding up in progress, and the section would apply to a going concern as well as in a winding up. That also seems to be the view of the Courts in England. S. 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. Further, as observed in Buckley on the Companies Act, 1929, Edn. 11 (p. 315), a wide interpretation has to be placed upon the section. The learned author observes:

> All modes of reorganizing the share capital, even when involving an interference with preferences or special rights attached to shares by the memorandum, can be effected as part of an arrangement with members under the section, with the possible exception, whilst S. 45 of the Act of 1908 was in force, of the two classes of reorganization of capital falling within that section, and subject to the qualification that if the arrangement involves a dealing with capital, e. g. reduction of capital, for which other sections of the Act prescribe special formalities, such formalities must also be complied with.

The following passage in the same work at p. 316 seems to be relevant to the question in debate in this case:

> It is no objection to an arrangement with classes of members under this section that it involves a winding up of the company and a transfer of its undertaking to another company, including a foreign company, for fully or partly paid shares in that company for distribution amongst the different classes of members of the transferor company in manner or proportions provided by the arrangement. In such a case the Court may, but does not necessarily, insist upon dissentient members being given protection similar to that provided by S. 234 in the case of a transfer under that section without the sanction of the Court. If, however, the so-called arrangement is really a transfer under S. 234 simpliciter, but without giving dissentients the protection provided by that section, quære whether the transfer can be sanctioned as an arrangement under this section.

On a careful consideration of the cases referred to by Buckley as authorities for the statement of the law and practice in the above passage, and others cited at the bar, it seems to be well established in England that (See *In re Palace Hotel, Ltd.*,[1] *In re Scheweppes, Ltd.*,[2] and *In re J. A. Nordberg, Ltd.*[3]) the Court can under this section sanction a scheme, even though it involves acts which, apart from such provisions, would be ultra vires the company; but this rule is subject to the limitation that if the Companies Act contains express provision enabling the doing of any act in a particular way, the provisions of the enabling section, and not those of S. 153 must be followed. The decision in the three cases to which I have referred above would seem to show that S. 153 as altered by the Act of 1929 would, read with S. 154, give a very wide power to a company in this respect and a scheme involving a re-organization of capital which altered rights conferred by the memorandum of association can be sanctioned under S. 120. A non-cumulative dividend conferred by the memorandum was altered into a cumulative dividend as part of a scheme under S. 120 [*United States and South American Investment Trust Co.* (00145 of 1913), Neville, J., 8th July 1913].

Mr. Setalvad relies on *Bisgood* v. *Henderson's Transvaal Estates, Ltd.*[4] In that case it was held that the sale of all the assets of a company and all its undertaking and the distribution of the proceeds cannot be a corporate object so that under a clause for that purpose introduced into the memorandum of association such a sale and distribution can be made without regard to the provisions of S. 161, Companies Act, 1862. In my opinion, this case is hardly applicable to the facts before me. It is conceded that in that case the company passed a resolution for winding up the company. That is not the case here. Then, the case only decides that the company cannot deprive the members of their rights under S. 161 merely because there was power to do so in the memorandum of association. This case was considered in *In re Anglo-Continental Supply Co.*[5] In that case it was held that the reconstruction of an existing company by winding up and sale of its entire undertaking and assets for shares in a new foreign company, though quite outside the scope of a reconstruction under S 192, Companies (Consolidation) Act, 1908, may be effected as an arrangement under S. 120. The decision in *Bisgood's case*[4] was explained by Astbury, J. in this way (p. 735):

> In *Bisgood* v. *Henderson's Transvaal Estates, Ltd.*,[4] the decision was limited to the proposition that a company cannot by its memorandum of

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[1] (1912) 2 Ch 438=81 L J Ch 695=107 L T 521 =56 S J 649=19 Manson 295.

[2] (1914) 1 Ch 322=83 L J Ch 296=110 L T 246 =21 Manson 82=58 S J 185=30 T L R 201.

[3] (1915) 2 Ch 439=84 L J Ch 830=59 S J 717.

[4] (1908) 1 Ch 743=77 L J Ch 486=98 L T 809 =15 Manson 163=24 T L R 510=52 S J 412.

[5] (1922) 2 Ch 723=91 L J Ch 658=128 L T 59 =66 S J 710=1922 B & C R 199.

association impose upon a minority of its shareholders a scheme under which such members must come under increased liability or be expropriated.

I think it would not be inappropriate if I were to refer to the arguments of counsel at p. 728 in that case. It seems to me that the principles, which apply to petitions like the one I have before me, are clearly laid down in those arguments which seem to have been accepted by Astbury, J. The arguments are as follows:

1. Where a scheme is exactly within S. 192, the provisions of that section cannot be evaded by calling it a scheme under S. 120: In re *General Motor Cab Co.*[6]; In re *Guardian Assurance Co.*,[7] at p. 450.

2. Where the scheme is only partly within S. 192, the Court has full jurisdiction to sanction it under S. 120 alone, and no resolution under S. 192 is necessary. It has merely to see that the scheme is fair. If as a matter of fairness it thinks that dissentients should have the protection of S. 192, it can make that protection a condition of its sanction: *see* In re *Canning Jarrah Timber Co., Ltd.*[8] and *In re Sandwell Park Colliery Co. Ltd.*[9] But that protection is not a matter of right: In re *Standard Exploration Co.*[10] referred to in Palmer, 11th Ed., pt. 11, p. 993; 12th Ed., p. 978; In re *Tea Corporation*; *Sorsbie* v. *Tea Corporation.*[11]

3. If, as in the present case, the scheme is altogether outside S. 192, proposition 2 applies a fortiori: *see* Palmer, pt. ii, 12 Ed., pp. 1009, 1015.

In my opinion, the decision in *In re Anglo-Continental Supply Co.*,[5] to which Mr. Setalvad has referred, amounts to this that the Court has a discretion to sanction a scheme like the one I have before me, even though the scheme may involve winding up, though in the exercise of its discretion the Court may impose certain conditions upon the Company before sanctioning the scheme. It is therefore difficult, in my opinion, to accept the argument of the learned counsel that the Court has no jurisdiction and that the petition is misconceived on the ground that in effect it is a petition under S. 213. Although S. 213 begins with the words "where a company is proposed to be ... wound up," it is clear from the language of S. 213 that the section can only apply in cases where there is a resolution passed for winding up a company, or where there is an actual winding up in progress, as all the powers given under that section are the powers of the liquidator and no one else. It is clear that the scheme here does not in terms come under S. 213. Here, there is no question of liquidating and paying in kind. Here, what is proposed is to reorganize the rights of different classes of shareholders. The gist of S. 213 is merely this, that where there is a winding up, whether voluntary or by the Court, or under the supervision of the Court, it is the duty of the liquidator to convert the assets of the company into money, pay the creditors and the costs of the winding up, and then to distribute the surplus, if any, among the members according to their rights and equities. The section merely deals with the powers of the liquidator.

Then, I may refer to the *Tea Corporation case.*[11] In that case it was held that under S. 2, Joint Stock Companies Arrangement Act, 1870, combined with S. 24, Companies Act, 1900, the Court has jurisdiction to sanction a scheme of arrangement with the creditors and contributories of a company in liquidation, notwithstanding the dissent of one class of contributories, if the Court is satisfied that having regard to the value of the company's assets that class has no interest in them, and that under such circumstances the scheme must be treated as made between the company and their creditors, and between the company and the other classes of contributories, and a provision made by it for the benefit of the dissentient class must be regarded as in the nature of a gift or concession to them.

In the English Act of 1929, S. 153 (corresponding to S. 153, Indian Act), it is declared that the expression 'arrangement' includes 'a re-organization of the share-capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods'; these words are taken from S. 45 of the English Act of 1908 (S. 54, Indian Act), which is not re-enacted in the Act of 1929. Such re-organizations can now be effected as 'arrangements' with members under S. 153 of the English Act, 1929 (Buckley, Edn. 11, p. 324). It is clear therefore that under the Act of 1929 in England a reorganization like the one which the Company seeks in this case can be effected without any objection. I see no principle or no ground why I should not follow the same principle. Mr. Setalvad relies on the case in *In re General Motor Cab Co. Ltd.*[6] which is also explained in *In re Anglo-Continental Supply Co.*[5] Apart from that, as observed by Stiebel in his Company Law, Edn. 3 at page 720, footnote (*d*) :

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[6] (1913) 1 Ch 377=81 L J Ch 505=106 L T 709 =19 Manson 272=28 T L R 352.

[7] (1917) 1 Ch 431=86 L J Ch 214=116 L T 193 =1917 H B R 113=61 S J 232=33 T L R 169.

[8] (1900) 1 Ch 708=69 L J Ch 416=82 L T 409 =7 Manson 439.

[9] (1914) 1 Ch 589=83 L J Ch 549=110 L T 766 =21 Manson 212=58 S J 432.

[10] (1902) The Times, March 21, p. 13c; March 26, p. 3b.

[11] (1904) 1 Ch 12=73 L J Ch 57=89 L T 516= 52 W R 177=11 Manson 34=20 T L R 57.

> The truth is that *General Motor Cab Co.*[6] has always been regarded as a very doubtful case, and S. 154 of the present Act certainly seems to contemplate the Court sanctioning such a scheme as the one in that case.

It is pointed out by Buckley in the footnotes at p. 316 that the decisions in *Tea Corporation*[11] and in *Standard Exploration Co.*[10] were not brought to the attention of the learned Judges in that case :

> It is however to be observed that the scheme in *General Motor Cab Co.*[6] was not a transfer under S. 234 simpliciter, but included an arrangement between the two classes of members as to the distribution inter se of the fully paid shares to be received. Semble, this case, in which the earlier decision of the C. A. in *Tea Corp.*[11] (in which the point was taken and fully argued and the preference shareholders in any event had an interest in the assets), and that of Buckley, J. in *Standard Exploration Co.*[10] were not cited, cannot be reconciled with the other cases : *see* also *Guardian Assurance Co.*[7]: [Buckley's Company Law, 11th Ed., p. 316, f. n. (*h*)].

Upon these authorities therefore, I have no hesitation in rejecting the arguments advanced and holding that the application under S. 153 is not misconceived, and the Court has jurisdiction to consider the scheme, and see if it is fair and reasonable. In this state of things, it is not necessary to consider the argument that the scheme involves, and must necessarily involve, a winding up. In support of that argument Mr. Setalvad has relied upon various statements made in the petition and affidavits and in the circulars and notices issued by the Company from time to time. I am certainly not satisfied on the materials before me that the scheme would necessarily involve a winding up. I am rather inclined to think, as the directors themselves say, that it is possible that the company would have to be wound up. Whether it involves a winding up or not, however, the application is under S. 153, and such an application is perfectly competent.

This brings me now to the question as to the discretion of the Court and the duty of the Court. This is laid down in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*,[12] by Lindley, L. J. in this way: (pp. 238-39):

> . . . what the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly. . . . take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

It is said that the scheme is not reasonable. It is clear that unless the resolution in question is sanctioned, the scheme of the merger cannot be put through. If the merger fails, I do not think that this Company would be able to carry on by itself in the light of its previous experience, and in the face of competition which it will have to face, if the other proposed partners in the Associated Cement Companies, Ltd., combine. The object of the scheme is really to reduce competition and to buy out the competition of the different companies among themselves. It is for this purpose that it is proposed that the preference shares should go out, and that the new shares of the new Company should be distributed between the ordinary and deferred share-holders. I am not prepared, to say having regard to the present value of the shares held by the preference share-holders, that they are having things all their own way. Under the memorandum, it is clear that the holders of the first preference shares are entitled to seven per cent. cumulative interest, and the second preference share-holders are entitled to the same rate of interest free of income-tax. The present value is Rs. 143, and the value proposed is Rs. 150. It is difficult to see how, if these people are paid these values, they will be able to realize the same interest as they are getting now under the memorandum of association. In my opinion, the scheme is fair and reasonable, put forward bona fide, and accepted by a very large majority of all classes of share-holders who have been acting honestly and bona fide on sufficient and detailed information and with plenty of time to consider what they are about. The test of a reasonable compromise or scheme is whether it is regarded by reasonable people conversant with the subject as beneficial to those on both sides who are making it. The question is, is the scheme made for the common benefit of all the share-holders, and in my opinion, it is. I am also of opinion, under the circumstances of the case, that the prices offered for the various kinds of shares are fair and reasonable.

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[12] (1891) 1 Ch 213=60 L J Ch 221=64 L T 127 =2 Meg 377.

Then, if the preference share-holders go out, and it is reasonable to expect the merger will succeed, the whole benefit of the merger will go to the ordinary and deferred share-holders. It is true that the deferred share-holders stand to gain a little more if the Company is wound up; but, as I have remarked, the Court has to consider the business point of view. The majority of the holders of deferred shares seem to be of opinion that the merger is for the benefit of all the share-holders including themselves. As against this majority, I have got a few dissentient share-holders who have not put any materials before me to enable me to hold that the scheme is being forced upon the deferred share-holders, and that if the scheme is rejected, the position of the deferred share-holders will be the same, if not a little better. I do not find on the affidavits made on behalf of these people any ground for thinking that there has been any oppression, or that the majority are not acting bona fide. As a matter of fact, the affidavits consist of nothing but sheer arguments and matters of law. No facts are put before me which would enable me to say that the scheme is unreasonable from the business point of view, and that the interests of the deferred share-holders are being deliberately sacrificed in order to benefit the other three classes of share-holders.

Then, the only question which remains is, whether I should impose any condition upon the company before sanctioning the scheme, in other words, whether I should ask the Company to make some provision for the dissentients. As the authorities, to which I have referred, show, the Court does not necessarily make any provision in favour of the dissentients, if the Court is satisfied that the scheme is reasonable and fair and in the interest of the general body of share-holders. In any case, under the modern practice, such a provision is not a *sine qua non* to sanctioning the scheme if it is reasonable and fair. The question therefore is whether there is any special case made out in the circumstances that I should exercise my discretion in favour of these dissentients. Now, it is clear from the affidavits that the whole scheme was carefully worked out and discussed threadbare by the directors and the various share-holders, and the share-holders had plenty of opportunities to express their opinions as regards the merits of the scheme. The result of the meetings and of the other steps taken by the directors clearly is that the majority have approved of the scheme and of the resolution without considering it necessary to have any provision made to buy out the rights of those who were opposed to the scheme and the resolution. To impose therefore any conditions at present in accepting the application made to me that there should be some provision made for the dissentients would really mean to undo the whole scheme. It is not as if that the Company should be asked to buy out only the persons appearing before me. Once it is known that the Court has made such a provision, the result in all probability would be that there will be many other persons who will be coming forward to exact as much as they can from the Company, with the result that the scheme practically will be wiped out. I see no special circumstances, and I should therefore impose no conditions at this stage.

Lastly, it was said that the meeting was not fair, and that many share-holders who would otherwise have voted were prevented from attending by a promise held out by one of the directors that if they did not oppose the scheme they would be able to make some money out of it. In my opinion, there is no evidence of any such suggestion made by the Company or even by any one else on behalf of the Company. I think the directors seem to have acted with scrupulous honesty in this case and taken the share-holders in their confidence right from the beginning and given them time to consider the whole situation, and it was after they found that the majority accepted the scheme that they came to the Court for sanction.

Upon the whole therefore, I have reached the conclusion that the petition must be accepted and made absolute. Order in terms of prayers (1) and (2) of the petition. The petitioners' costs will be paid by the Company. There will be one set of costs to be paid by the Company for the shareholders represented by Mr. Setalvad and Mr. Desai. As Mr. Engineer's and Mr. Sabnis' clients voted at the meeting in favour of the scheme and now oppose, they are not entitled to any costs.

D.S./R.K. *Petition made absolute.*

A. I. R. 1937 Bombay 432

BEAUMONT, C. J.

Borough Municipality of Ahmedabad — Applicant.

v.

Jayendra Vajubhai Divatia — Opponent.

Civil Revn. Appln. No. 326 of 1936, Decided on 2nd December 1936, against order of Asst. Judge, Ahmedabad, in Misc. Appln. No. 177 of 1934.

Bombay Municipal Boroughs Act (18 of 1925), S. 198—Ss. 23 to 25, Land Acquisition Act, lay down principles on which District Court is to determine compensation for compulsory acquisition of land—These sections apply to proceedings in District Court under S. 198, Municipal Act—District Judge can allow fifteen per cent. in addition to compensation under S. 198.

Sections 23, 24 and 25, Land Acquisition Act, constitute a code laying down the principles on which the District Court is to act in arriving at the compensation to be paid and it is impossible to leave out of that Code sub s. (2) of S. 23 of that Act. These sections determine the basis on which the value of the land is to be ascertained on compulsory purchase and allowance of the fifteen per cent. must be set off against matters disallowed under S. 24. [P 433 C 1]

These sections apply to proceedings in the District Court under S. 198, Bombay Municipal Boroughs Act. The District Judge is entitled to allow the fifteen per cent. under S. 23, Land Acquisition Act, in addition to the amount of compensation awarded under S. 198 of the Act for compulsory purchase: *14 Bom 292* and *18 Bom 184, Disting.* [P 433 C 1]

U. L. Shah — for Applicant.

N. H. Bhagwati and *P. A. Dhruva* — for Opponent.

Order.—This is an application in revision under S. 115, Civil P. C., it being alleged that the learned Judge has exercised a jurisdiction not vested in him. The point raised is of some importance in connexion with compulsory purchases under the Bombay Municipal Boroughs Act, 1925. Under S. 118, the Municipality can lay down lines of the public streets, and acquire land for adding to a street, and then sub-s. (3) (c) provides that compensation, the amount of which shall in case of dispute be ascertained and determined in the manner provided in S. 198, shall be paid by the Municipality to the owner of any land added to a street under Cl. (b) of sub-s. (3) for the value of the said land. So that, what is to be paid is compensation for the value of the land compulsorily taken. Then S. 198 provides for the method of assessing compensation. If the amount is not agreed, the parties have to appoint arbitrators, who are to select a sirpanch, and in the event of this panchayat not arriving at a decision, then the matter shall, on application by either party, be determined by the District Court, which shall, in cases in which the compensation is claimed in respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court, with the two exceptions which are referred to in the Proviso following.

Now the question is whether the District Court, in fixing compensation for the value of the land, is entitled to allow fifteen per cent. on account of the compulsory nature of the acquisition. There is no express provision in the Bombay Municipal Boroughs Act, allowing for such addition to the compensation, but under the Land Acquisition Act, fifteen per cent. is allowed in respect of the compulsory nature of the acquisition, and the question is whether that provision in the Land Acquisition Act can be treated as incorporated into S. 198, Bombay Municipal Boroughs Act, as being part of the procedure provided by the Land Acquisition Act. I agree that prima facie a provision of this sort, adding to the compensation to be payable for the value of the land, is not aptly described as procedure, but still one has to look at the Land Acquisition Act and note the phraseology adopted. One finds Part 3 headed "Reference to Court and Procedure thereon". Then there are provisions for referring disputes as to compensation to the Court, and certain procedure is laid down, and then S. 23 provides in sub-s. (1) that in determining the amount of compensation to be awarded for land acquired under the Act, the Court shall take into consideration certain matters therein specified, and then sub-s. (2) provides that:

> In addition to the market value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market-value in consideration of the compulsory nature of the acquisition.

Then S. 24 provides that the Court shall not take into consideration certain specified matters, of which the second is, any disinclination of the person interested to part with the land acquired, and then S. 25 contains more provisions as to the method of calculating compensation. It seems to me that Ss. 23, 24 and 25 of the Act constitute a Code laying down the principles on which the District Court is to act in arriving at the compensation to be paid, and it is quite impossible to leave out of that Code sub-s. (2) of S. 23 as Mr. Shah has invited me to do. His contention is that the fifteen per cent. is an allowance of something in addition to the value of the land which has to be paid for under the Municipal Act. But the truth is that the sections determine the basis on which the value of the land is to be ascertained on compulsory purchase and the allowance of the fifteen per cent. must be set off against matters disallowed under S. 24. These provisions in the Land Acquisition Act are contained in a Chapter entitled "Reference to Court and Procedure thereon," and I think that they must be treated as applicable to proceedings in the District Court under S. 198, Bombay Municipal Boroughs Act. In my opinion, therefore, the judgment of the learned District Judge was correct, and he was entitled to allow the fifteen per cent. for compulsory purchase. The two cases on which Mr. Shah relied and which are referred to in the judgment of the lower Court, 14 Bom 292[1] and 18 Bom 184,[2] were cases in which there was no provision similar to that in S. 198 (3), Bombay Municipal Boroughs Act, incorporating the procedure under the Land Acquisition Act. Therefore those cases afford no assistance to me in deciding the present case. The application must be dismissed with costs.

W.D./A.L. *Application dismissed.*

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[1] Municipal Commissioner for the City of Bombay v. Patel Haji Mahomed Ahmed Janu, (1890) 14 Bom 292.

[2] Municipal Commissioner for the City of Bombay v. Syed Abdul Huk, (1893) 18 Bom 184.

A. I. R. 1937 Bombay 433

BROOMFIELD AND WASSOODEW, JJ.

Vithalrao Chidambarrao Heblikar and *others* — Defendants — Appellants.

v.

Baswant Bisto Nadgir and *others* — Plaintiffs — Respondents.

First Appeal No. 143 of 1929, Decided on 9th November 1936, from decision of Joint First Class Sub-Judge, Dharwar, in C. S. No. 34 of 1924.

(a) Trust — Creation — Watandar nadgir holding land subject to payment of judi—On default in payment of judi, Ruler taking over land as Zapt—Land subsequently granted absolutely in Jahagir to another—Jahagirdar however, for long time describing it as 'kamavishi judi land' or as 'amani' or 'vopun dile' land — Introduction of British Rule—Inam Commissioner holding that grant in favour of jahagirdar was 'sarva inam'—Description of land as 'kamavishi', 'amani' or 'vopun dile' held did not create trust—Binding effect of decision of Inam Commissioner stated.

Before the introduction of British Rule, the ancestors of *A* held certain land as watandar patils, kulkarnis and nadgirs of a village subject to payment of fixed judi. The obligation to pay judi not being fulfilled, the Ruler took over the land as Zapt. The land appertaining to the Zapt Inams of the nadgirs was subsequently granted as jahagir absolutely to the ancestors of *B* who, however, for a long time described the land as 'kamavishi judi land' or as 'amani' or 'vopun dile' land in village accounts. With the introduction of the British Rule, an Inam Commissioner was appointed to enquire into the claims to exemption from the payment of land revenue. That Commissioner after enquiring into the claim of the ancestors of *B*, decided that theirs was a 'sarva inam', i. e. permanent revenue-free grant. *A* sued *B* for possession of the land on ground that it was handed over in trust to *B*'s ancestors on condition of being returned when nadgirs were prepared to pay judi:

Held: that the description of the land as 'kamavishi' or 'amani' or 'vopun dile' by the ancestors of *B* did not create a trust and did not make them trustees even if they kept the land in a suspense account with a view to its restoration: *(1876) P J 47, Expl.; 7 B H C R A C 149 Disting.* [P 440 C 2]

Held further: (Per *Wassoodew, J.*)—that the decision of the Inam Commissioner was not binding on nadgirs who were not parties to the enquiry. [P 439 C 1]

(Per *Broomfield, J.*)—that the decision of the Inam Commissioner was just as much binding on nadgirs as on the jahagirdars. [P 445 C 2]

(b) Grant — Pre-British watan grant — Assumption of sovereignty by British Government—Presumption.

There is no presumption that upon the assumption of sovereignty by the British Government, the pre-British watan grant was recognized: *A I R 1915 P C 59* and *A I R 1924 P C 216, Ref.* [P 440 C 2; P 441 C 1]

(c) Limitation Act (1908), S. 10—Nadgir watandar holding land subject to payment of fixed judi — Default in payment — Mere assumption of management by sovereign power is not tantamount to vesting in trust for specific purpose.

In order that the statute of limitation might be ousted, there must be a direct trust constituted by the act of parties and not a constructive trust arising by implication of law. Where land is held by a nadgir subject to payment of fixed judi, the mere assumption of management by a sovereign power of land on failure to pay the customary judi is not tantamount to 'vesting in trust of such land under S. 10, Limitation Act. The words "in trust for a specific purpose" in that section must obviously receive a restrictive interpretation. Even if the land is freely surrendered by the nadgir into possession of the sovereign power or the grantee through it on account of nadgir's inability to pay the customary judi, the payment of which is an essential condition of the tenure, that surrender whether voluntary or not will not necessarily create a trust of the limited character within the meaning of S. 10. [P 441 C 1]

(d) Civil P. C. (1908), S. 112 and O. 22, R. 4—Decree passed by Privy Council against respondents in ignorance of death of one of them is not nullity though his legal representative was not brought on record.

The provisions of the Civil P. C. do not apply to appeals before the Privy Council. Hence a decree passed by the Privy Council against respondents in ignorance of the death of one of them is not a nullity though the legal representative of the deceased was not brought on the record, the decree being an order of the Sovereign: *A I R 1920 Pat 89*; *A I R 1924 Mad 695* and *A I R 1932 Pat 261, Rel. on.* [P 442 C 2]

G. N. Thakor, R. A. Jahagirdar, S. B. Jathar and *K. N. Dharap* — for Appellants.

A. G. Desai, B. N. Lokur and *G. R. Madbhavi* — for Respondents.

Wassoodew, J.—This is an appeal from the decision of the Joint First Class Subordinate Judge of Dharwar who decreed the claim in the suit brought by the plaintiffs as representatives of the junior branch of the nadgir family of Hebli, a jahagir village in the District of Dharwar, for possession with mesne profits from the jahagirdars, defendants 1 to 10, of 47½ mars of land and for accounts of the profits after adjusting the same towards the judi or quit-rent recoverable from the holders.

The plaintiffs alleged that their ancestors were the watandar patils, kulkarnis and nadgirs of Hebli and that the lands in dispute were part of the watan lands consisting of 200 mars granted to them, prior to the grant of the jahagir to the defendants, for remuneration by the old Rulers subject to the obligation of service to the village and the payment of the judi fixed on the lands. It was further alleged that the obligation with respect to the payment of judi was not discharged and that in or about 1832 the lands were handed over in trust to the jahagirdars for reimbursing themselves for the loss of judi out of the income and for restoring the lands to the watandar nadgirs whenever the latter offered to pay the judi regularly in respect of the said lands. The plaintiffs have now offered to pay the balance of the judi if any recoverable and due upon the lands on condition of the restoration of the lands by the defendants trustees. That part of the case which relates essentially to the alleged trust is thus adumbrated in the plaint:

> About 1832 or later than that, the ancestors of plaintiffs became unable to pay the said judi. Therefore they gave possession of the said lands to the ancestors of defendants 1 to 10 as deposit or trust for obtaining the said judi on condition that the lands would be given back to these ancestors of the plaintiffs or to their heirs whenever they would ask for them and would agree to pay the judi. The ancestors of the plaintiffs did not give up their interest in or right to the lands and the ancestors of the defendants never took those lands as owners either at the time of taking them or afterwards, but had taken the said lands as trustees. Thus according to the trust, the said saranjamdars are in the enjoyment of those lands as kamavishidars and it has been so mentioned in their accounts accordingly. The lands were given in the possession of the said saranjamdars as trustees and they are in their possession as such.

The defendants jahagirdars have set up a grant to their ancestors of the village in 1748 from the then Nawab of Savanur inclusive of the lands in dispute which are part of the 200 mars of land originally assigned as remuneration to the offices of patils, kulkarnis and nadgirs of the said village. The defendants alleged that those lands together with the offices in question were incorporated in the grant to them by reason of the fact that the defendants' ancestors who were previous owners of these lands had failed to pay the judi and raised a rebellion, that their watans therefore came to an end upon resumption long before 1723, and that having regard to the defendants' long possession of the lands in dispute in their own right, these lands are now their private hereditable and transferable property. It was also said that the jahagirdars' right was recognized by Government after the enquiry under Bombay Act 11 of 1852, that the said right was confirmed in the prior suits between the nadgirs and the jahagirdars and that the Privy Council in Appeal No. 149 of 1924,[2] which was decided between the parties during the pendency of the present suit, had set aside the order of Government directing the levy of contribution from the defendants for payment of remuneration to the watandars, patils and kulkarnis. The defendants therefore maintained that the lands in dispute ceased to partake of the character of watan property and that the previous decision operated as res judicata. The alleged trust was expressly denied by the defendants and limitation was set up as a bar to the plaintiffs' claim to possession.

The principal contentions between the parties appear to be crystallized in thirteen issues settled in the trial Court of which the principal ones were: whether the plaintiffs proved that the defendants were holding the suit property in trust for the plaintiffs as alleged in the plaint, whether the prior judgments referred to by the defendants operated as res judicata and whether the claim to possession was in time.

The learned trial Judge has held that the suit was not barred by reason of the decisions in the prior suit, and that the defendants were in possession of the lands as trustees for the plaintiffs. The finding as to fiduciary relationship between the defendants and the plaintiffs and the creation of an express trust in relation to the lands in dispute is thus expressed by the learned Judge:

> I think in this case the lands were given to the jahagirdars for management. The jahagirdars were interested in taking over the management, as judi was payable to them every year, and it used to fall in arrears. They were to let the lands out, and pay themselves the judi. If there was a deficit, they were to reimburse themselves from other cesses due to the nadgirs. It follows that they were to account for the excess, if any, remained with them if the nadgirs demanded that. To create an express trust, two things must combine. There must be a trustee with an express trust, and an estate or interest vested in the trustee. In other words, there must be evidence that a trust has been created for some specific purpose, and that property has become vested in a trustee with the object of carrying that purpose into effect. I think all these ingredients exist in the present case, and I should think this also a case of trust for specific purpose.

The learned Judge concluded that the trustees having never openly and actively asserted a hostile title to the knowledge of the plaintiffs, the plaintiffs' claim was not barred by limitation. He was also of the opinion that having entered into possession on certain terms, the jahagirdars were estopped from denying or setting up an adverse title and that the matter would have been different if the plaintiffs had made an offer to pay the judi and there was a refusal to accept the same.

The facts leading to this litigation are somewhat complicated and as they have been found enumerated in the several judgments which are reported in the authorized reports (*Shrinivas* v. *Secretary of State*[1] and *Laxmanrao Madhavrao* v. *Shriniwas Lingo*[2]), it is unnecessary to set them out in detail except the material facts which are necessary for the present purpose. They are as follows:

The ancestors of defendants 1 to 10, who represent the junior branch of the jahagirdar family of Hebli, were the grantees of that village under a sanad of 1748 from the then Nawab of Savanur (Ex. 332). The operative part of that grant is as follows:

> We have conferred upon you, the said gallant gentleman (Balvantrao Appaji) the kasba of Havur Hebli together with hamlet and Vatanhal and lands appertaining Zapt (i. e. attached) Inams of Muccadum and nadgirs and others in the District of Torgal, by way of a perpetual Inam exclusive of taxes relating to Ijrah Mokhasa and exclusive of Haqdars and Inamdars and exempting Kulbab Kulkannu.

Contemporaneously with that grant, the grantor wrote a letter to the agents of the State in Hebli in which a clear intention was expressed to confer an absolute title. That letter reads thus:

> We have conferred upon him, his children and grand-children the Kasba of Havar Hebli together with the hamlet and Vatanhal and lands appertaining to Zapt (i. e. attached) Inams of Muccadum, nadgirs and others by way of a perpetual Inam.

It is not seriously denied before us that the "lands appertaining to the Zapt Inams of the nadgirs," referred to in the above documents comprised of the 200 mars which were assigned originally for remuneration to the offices of patils, kulkarnis and nadgirs subject to the payment of a fixed judi to Government which was

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1. A I R 1922 Bom 18=24 Bom L R 214.
2. A I R 1927 P C 217=105 I C 694=54 I A 380 =51 Bom 830 (P C).

very much less than the full assessment. It appears from the record (Exs. 152, 151 and 150) that prior to the grant that judi had fallen into arrears, and in 1723 or thereabouts, the management of the lands was taken over by the ruling power apparently for the purpose of realizing the arrears of the judi out of the income. That is what is implied by the term "Zapt". That management appears to have continued with the Rulers at the time of the grant to the defendants-jahagirdars. According to the extract of the jaminzada (village account) of 1741—Ex. 150, those 200 mars were thus described in the Government record "200 mars of Inam land in respect of nadgirs paying judi which has been credited as kamavishi land in Sarkar". Though the lands were absolutely conveyed to the jahagirdars by the sanad, they were not differently described by the grantees in their village accounts till the year 1860 and were shown under the heading "kamavishi judi lands". It may be noted that in the accounts of 1843 the following entry appears against the lands in question :

> Rs. 890-6-0 : In respect of the land measuring 50 mars belonging to judidars, which has been entered as kamavishi the revenue of which has been received by giving it to the tenants for cultivation and the land measuring 1 mar given to Shivangouda Koli for 15 hons which could not be paid by him owing to poverty. The amount of judi in respect of 50 mars of land which remains after deducting the land measuring one mar from the abovementioned 51 mars of land, comes to Rs. 1406-4-0. As judidars were unable to pay this amount of Rs. 1,406-4-0, they delivered over ('vopun dile') the lands. At that time they made a request and got settled that they would pay the amount that falls short of kamavishi lands when they would take their watan in their possession and that some land should for the present be given to them for maintenance. Therefore that land was entered as kamavishi land.

The description of these lands as "kamavishi judi" lands also appears in the other village accounts of the same and subsequent years, the extracts of which are produced in the case : *vide* Exs. 297, 299, 300 and 313 of 1843; Ex. 309 of 1854; Ex. 89 of 1857; Ex. 303 of 1858; Ex. 304 of 1859 and Ex. 90 of 1860.

The nadgir plaintiffs have based their case of express trust principally upon the above entries since 1832 in the jahagirdars' accounts, particularly the description 'kamavishi' and the words 'vopun dile' as applied to their watan lands. These expressions also occur in certain statements of the jahagirdars in 1832 and are relied upon as affording evidence of the creation of a trust in or about that year by the plaintiffs' ancestors. The important question is what effect should be given to them.

It is urged on their behalf that those words imply the entrusting into the possession of the jahagirdars the lands in question. That act, according to the plaintiffs, constituted a direct trust for a specific purpose. The plaintiffs also relied on certain admissions of the inamdars through their agents to fortify their position. One of such admissions is contained in the statement of one Krishnarao, pleader, in May 1832 (Ex. 298) before the Mamlatdar who was enquiring into the complaint of the nadgirs that they were not permitted to remove the produce of the watan land. In that statement, it was admitted that the patlis were allowed to cultivate the land on payment of judi and to free it from weeds and that on failure to fulfil those conditions, the land was taken back. The material portion of the statement is as follows :

> Recently, when the elder Balwantrao left the Sansthan of Nargund and came to Hebli and lived there, the patils of Kasbe aforesaid requested him that as the land was full of nat they could not carry on household affairs and maintain themselves upon what remained after paying the revenue equal to the full assessment. Thereupon the amount of judi was fixed at Hons (pagodas). The period of the agreement expired in our time. Thereafter they (nadgirs) again got fixed the amount of judi at 750 nanes (coins) under a makta (agreement) through two persons by name Chaturdas and Tinmaji Shesho. Therefore the nadgir's land was kept amani in the same manner as the lands of all other persons were kept amani. The amount of balance is due. It is not a resumed land. It is a land for which old judi had been got fixed under a makta (agreement).

The above statement made by the jahagirdars' agent was perhaps made in response to the enquiry by the British officers into the disputes that were going on between the nadgirs and the jahagirdars which at one time in 1821, upon the suit of the nadgirs, were compulsorily referred to arbitration under the direction of the said officers : *vide* Ex. 245. It appears that a portion of the Dharwar District was annexed to the British territory some time in 1819 and another portion later on in 1830 when Bombay Regulation 7 of 1830 was passed. That fact explains the interference of the British officers. It is doubtful whether any effect was given to the ex parte award, but its significance lies in the fact that the jahagirdars were then admitted to be in possession in their own right and not as kamavisdars or in any other capacity. There could be no question of trust at that time having regard to the pleadings in this suit.

The effect of the words used in the above documents such as 'kamavishi' and 'vopun dile' is, as I have stated, now in dispute. Although no technical expressions are needed for the creation of an express trust, the Court must be satisfied that the settlor has indicated with reasonable certainty an intention to create a trust specifying its purpose. The word 'kamavishi' has been defined by Molesworth as "the business of collecting the revenue". Wilson in his Glossary has attributed the following meanings to the word 'kamavishi':

> management of affairs, whether on behalf of an individual or the estate, stewardship, superintendence ; amongst the Marathas it applies especially to the business of collecting the revenues, also to the collections, especially when of a miscellaneous kind ; also advantage, gain, profit.

As regards the word 'amani' used in the documents of 1832, Wilson in his Glossary has suggested the following interpretation of that word :

> Held in trust or deposit ; applies especially to the collection by the officers of Government upon the removal or suspension of an intermediate claimant or zamindar, the same as the khas collection : it is also applied to ryotwari settlements, or settlements with each cultivator individually, where no renter or proprietor has been acknowledged ; also to lands in the possession of the Collector's officers for arrears of revenue, or which, on any other account, are not held by individual tenants.

The use of those words is not helpful in my view to the plaintiffs' case of trust.

The term '*vopun dile*' is certainly not a familiar expression indicating the creation of a trust. According to Molesworth the term '*vopun dile*' means 'conveyed to the care of or delivered in trust of'. Assuming that these words are susceptible of the construction that the lands were not attached by the ruling power prior to the grant to the jahagirdars and suggest a voluntary surrender by the holders, in my opinion, they would not necessarily imply the creation of a trust.

It is a just and reasonable inference that the grantor of the jahagir, who was competent to confiscate the lands on failure to pay the judi, had in the village accounts distinguished the lands attached from the watandars from the other Government or khalsat lands. There is no evidence on the record that either the grantor or the grantees of the jahagir maintained a separate account of these rents or whether at any time the excess over judi, if any, was shown to the credit of the watandar nadgirs. Apparently the system in vogue of dealing with the lands in question was adopted by the grantees. It seems to me obvious that upon discovery of the nature of the village accounts, and the statements of the jahagirdars referred to, the plaintiffs have founded their plea of trust supposed to have been created in 1832. The subsequent conduct of the parties however is as much repugnant to the intention of the nadgir watandars to create a trust as of the jahagirdars to accept the same.

The earliest document which militates against the creation of a fiduciary relationship is the representation of the nadgirs to Government in the year 1843 : *vide* Ex. 155. In that petition the nadgirs have complained of the obstruction of the jahagirdars to the cultivation of their lands and the forcible deprivation of their watans by them — a plea which was repeated in the suits instituted by some of the members of the nadgir family in the years 1858 and 1859 to recover back possession of part of the estate. The attitude of the jahagirdars towards those complaints is thus expressed in their statement of 26th February 1845—Ex. 296 :

> The nadgirs are not holders of sarva inam. They are judidars (persons paying judi). When our ancestors were in the Samsthan, they acquired the said village of Hebli as sarva inam together with Kulbab and Kulkanu. Since that time the nadgirs have been carrying on wahivat of the watan (and enjoying the same) by paying ancient judi from the time of their ancestors. Recently, in the time of thirtharup, the complainants delivered over (opun devun) the whole of the watan as they could not manage the watan ; and made a request that lands for maintenance should be given to them. If the said persons (i. e. nadgirs) are willing to enjoy the watan by paying ancient judi, we shall continue watan that belongs to them, whatever the same (the watan) may be. The complainants gave up the watan formerly of their own free will and now they say that we take the watan by force and thus they lower us in the eyes of the people.

The implication of the above is obvious. The utmost that can be said in favour of the nadgirs is that their watan lands were not confiscated and that they voluntarily relinquished possession. Apparently, there was a desire on the part of the jahagirdars to rehabilitate the watandars to their former position. That seems to be consistent with the view that they were prepared to treat the nadgirs with indulgence in the matter of resumption of the lands if the arrears of judi were paid. Apparently the nadgirs were not satisfied with those terms and were attempting to regain their watan through the intervention of the Collector free from any obligation whatsoever.

That was the state of things till the year 1852, when Bombay Act 11 of 1852 came into force and an Inam Commission was appointed to inquire into the claims to exemption from the payment of land revenue. That Commission after inquiring into the claims of the jahagirdars found that theirs was a "serva inam," i. e. permanent revenue-free grant, and that they were holders under the saranjam tenure. That decision appears to have been approved by Government in or about the year 1856. After that decision, there was an inquiry into the kadim inams. It appears from the letter addressed by the jahagirdars to the Collector in 1862 (Ex. 333) that they repudiated the watandar patils' claim to the land in the following words :

> From the time the village of Hebli was granted in jahagir up to this day we have been enjoying all the lands. If after the grant of the jahagir we and our ancestors had attached the lands of the inamdars, it would have been a matter of loss to those persons and they would have lodged a complaint immediately.

The claim before the Commission was that the lands were enjoyed as khalsat lands and were not liable to the payment of judi to Government. Upon the evidence tendered, the Commissioner made his recommendations to Government which were ultimately accepted : *vide* Ex. 161 :

> It is to be remarked however that the land rolls referred to, show that the Heblikars at the date of the acquisition of the village did not receive items 15, 16 and 17, averaging 200 mars as bona fide khalsat but as coomavisee, though, as it appears upon an order dated 1792 from Purushram Ramchandra Patwardhan, a competent authority, to Trimbukrao Anna, the Soobedar of the Dharwar Talooka, that the coomavisee management at the date still remained as before, and as there is nothing to show that at any subsequent period even up to the present time it had altered, with the exception of 7¼ mars and 3 beegas, which at some time unknown had reverted to the nadgeer, it may be allowed that the coomavisee management of the remaining 192½ mars and 6 beegas has assumed a permanency of tenure which cannot justly be interfered with and that the gramjoshee's land of 6 mars and the nadgir's land of 7¼ mars and 3 beegas be alone made amenable to settlement as held from Government, when the order for the settlement of alienated villages shall be authorized.

It seems to me unnecessary to dilate upon the effect of that decision as it is not the subject matter of controversy in this appeal. I may however mention that this Court in the judgment recorded in Appeal No. 3 of 1876 (Ex. 243) took the following view of that order :

> It is not clear that the Inam Commissioner arrived at the conclusion that the land was absolutely the property of the jahagirdars. But even if such were his conclusion, the plaintiff (nadgir) is not bound by a decision made in an inquiry to which he was not a party and the object of which was simply to settle the respective rights of the Government and the jahagirdars.

It is indeed difficult to say that the nadgirs did not contest the position taken up by the jahagirdars before the Comission although the evidence of their actual participation in the inquiry is scanty. It would appear that the nadgirs complained against the conduct of the jahagirdars and perhaps in response to that complaint their claim was referred for the orders of the Inam Committee in 1848. In that year a list of documents prepared by the nadgirs in support of their case that the lands were kadeem inam was submitted to the Inam Committee : *vide* Ex. 154. It has been said that that list was prepared upon the general direction of the Revenue Officers who were collecting evidence. That does not nullify the effect of the complaint of the nadgirs regarding the jahagirdars' encroachment on their rights. That complaint is inconsistent with the plea raised in this suit.

It is clear from para. 7 of Major Etheridge's letter of 1864 that a recommendation was made for the settlement of 7½ mars of land. It is doubtful whether that recommendation was made by him as Settlement Officer or as President of the Tribunal constituted under Act 11 of 1852. There was nothing in my view to prevent that Committee, if the nadgirs had set up their claim to partial exemption from the payment of assessment for their watan lands, from inquiring into that claim. But in doing so they would have had to consider the rival claims of the jahagirdars. I am not satisfied that under the Act, the adjudication of the rival claims was within the competence of the Committee or that their recommendations in effect constituted such adjudication. There is much to be said in favour of the view adopted by the High Court in 1876 that the nadgirs are not bound by the decision of Major Etheridge. It is however unnecessary for the present purpose to pursue the point further.

The state of affairs in 1864 was that the jahagirdars had succeeded in establishing before Government their right to possess the lands of the patils as grantees free from the payment of judi or assessment. The accounts subsequent to that period show that the lands were described as khalsat and the judi on these lands has been appropriated as before by the jahagirdars : *see* Exs. 160 and 165.

It has been pointed out to us that in the statement prepared on behalf of one of the jahagirdars in March 1924 (Ex. 269), some of these lands have been shown as kadim kamavishi. Apparently that statement was prepared upon the decision of the High Court to which I shall presently refer and which was reversed in appeal. The High Court attributed a specific character to the jahagirdars' possession of the watan lands upon which the order of Government directing the recovery of contribution towards the remuneration of the patils was maintained. It seems idle to contend that the statement of 1924 contains a voluntary admission of the character of the land described therein or that it represents a system of accounting since 1864 of these watan lands which the jahagirdars had succeeded in claiming as part of their private property. In 1868, certain members of the junior branch of the nadgir family instituted Suit No. 83 of 1868 to recover 22 mars out of 100 mars which was the area allotted to the junior branch of the watan family. That was the first time after the decision of 1864 that the nadgirs had an opportunity to refute by suit the allegations of the jahagirdars. It is important to note that no express trust was set up then. The High Court, however, upon the acknowledgments of the jahagirdars which were construed in favour of the nadgirs, decreed the claim on the following grounds: *vide* Ex. 243 :

> The land was not shown in the accounts as 'khalsat' but as 'kamavishi' ; and this entry under a suspense heading indicates that the land was not treated as having absolutely lapsed to the jahagirdar, but that a right of redemption by the patils was considered to be still existing. This right may have created by express agreements as alleged by the plaintiff, and as stated in Ex. 72 it was founded upon the custom of the country, which is always favourable to the preservation of the official emoluments of hereditary district and village officers. But it should be considered that the admissions and offers in question amount to a distinct recognition of the plaintiff's right.

The view I take of the effect of the statement of accounts and the admissions of the jahagirdars is that they were desirous and prepared to restore the lands to the nadgirs upon an appropriate offer by the latter to pay the judi that was in arrears and had no intention to confiscate the watan. The suggestion that the conduct referred to is expressive of an express trust is ill-founded. I may in this connexion also refer to certain litigations between the jahagirdars and the ancestors of the plaintiffs which indicate that it was far from the minds of the nadgirs to suggest that the jahagirdars were their trustees—Ex. 43. The Suit No. 730 of 1858 was filed to recover possession of mar 1 annas 14 of the watan property and the cause of action was based upon forcible dispossession by the jahagirdars. It appears that the suit was eventually dismissed upon the refusal to proceed with it—*vide* Ex. 100. In the subsequent suit of 1859 a similar claim for 11 mars was made by the ancestors of the plaintiffs. There is no reference to any trust in favour of the nadgirs—*vide* Exs. 92 and 146. That is a significant piece of conduct of the plaintiffs which repels the suggestion of trust. After the suit of 1864 which was finally disposed of in 1876 by the High Court in favour of the nadgirs, the jahagirdars were deprived of 22 mars of watan lands. But the latter continued in possession of the remaining area when the Bombay Hereditary Offices Act (3 of 1874) came into force. That gave an opportunity to the nadgirs to petition the Collector to regain possession of their watan lands. In that petition (Ex. 163), which was submitted in October 1883 by the plaintiffs' ancestors, the following facts were mentioned among other things :

> The said lands are with the jahagirdars as amanat since the judi in respect of the said lands could not be paid and whenever (at any moment) we would pay the judi, the same should be freed (returned) and in accordance therewith it is proved. We are now accordingly ready to pay. But the jahagirdars deny to hand over possession of the lands. These lands had been given in

inam even before the jahagirdars acquired the village and therefore they had no ownership over the same at all; but they (the said lands) are either of our ownership or that of the British Government. It is clearly mentioned in Act 3 of 1874 that we are the owners of patilki and kulkarniki watans. But the jahagirdars have the right only to recover the judi at Rs. 22-8-0 per mar but they have no right at all to enjoy the watan. But without any reason, the jahagirdars have been wrongfully enjoying the watan belonging to the ownership of the British Government.

That perhaps is the first indication in the nadgirs' complaint that the jahagirdars were holding the lands upon certain terms and conditions. But even then there is no clear indication that they were trustees. It is difficult to believe the statement in the petition that there was an agreement to return the lands on the terms indicated. It is unreasonable to hold, having regard to the prior admissions of the plaintiffs about the restoration of the lands, that the jahagirdars under that agreement were holding the watan for an indefinite period for the benefit of the plaintiffs under those terms. The history of the conflict between the parties culminating in the present suit will not be complete unless reference is made to the enquiry under Act 3 of 1874. It appears that various interlocutory orders were passed upon the representation of the nadgirs and after hearing the jahagirdars. The final result of that enquiry which was accepted by Government was that the nadgir family were the representative watandars, that the whole of the watan lands should therefore be entered in the watan register as such and that it was not necessary to recover for the watan from the jahagirdars in possession more than what was required for the emoluments of the officiators under the Act; and accordingly under the directions of Government, contributions were levied from the jahagirdars for the remuneration of the officiating patils and kulkarnis. Upon the enforcement of that order the jahagirdars instituted Suit No. 2 of 1913. The plaintiffs in that suit were certain members of the senior branch of the jahagirdar family and they claimed a declaration (a) that they and not the nadgirs were the watandar patils and kulkarnis of Hebli village, (b) that the lands measuring 120 mars be entered in the watan register of the village, and (c) that the jahagirdars were not liable to contribute for the remuneration of the officiating watandars. The first Court decreed the claim. The High Court in appeal dismissed the suit in 1921. It was upon that dismissal that the nadgirs instituted this suit for the aforesaid reliefs. In the meantime, the jahagirdars had filed an appeal to the Privy Council and obtained a decision in their favour to the effect that they were not liable for the remuneration of patils and kulkarnis and that the contribution with respect to that item should be refunded. As to the result of that decision, upon the contention of the parties to the dispute, I shall, when dealing with it, show that it impliedly negatives the nadgirs' contention.

I am satisfied upon a careful consideration of the above documents and the conduct of the parties that the jahagirdars did not stand to the nadgirs in a fiduciary or semi-fiduciary position. The fact that the lands were attached by the rulers for breach of the terms of the tenure did not constitute the rulers trustees and the continuance of the attachment even upon a voluntary surrender would not necessarily create a trust. The view I take is that even if the jahagirdars kept the lands in a suspense account with a view to their eventual restoration in order to show indulgence to the defaulters, who had failed to pay the judi in time, the legal position could not be altered in the nature of things. The jahagirdars did not stand in the position of confidential agents towards the nadgirs so as to invite the application of the rule in *Soar* v. *Ashwell*,[3] as suggested for the respondents. I have already stated that no obligation to account was undertaken by the jahagirdars and no accounts were called for or rendered. The manner, therefore, of describing the lands in the accounts could not make the person acquiescing in the description a self-constituted trustee in the absence of satisfactory evidence of an express trust.

The underlying assumption in the plaintiffs' case was that their watan grant was recognized by the British Government before 1832, that the intercession of Government officers is explainable on that hypothesis, and that the jahagirdars in accepting the trust intended to perpetuate their watan thus ousting limitation. There is no presumption that upon the assump-

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3. (1893) 2 Q B 390=4 R 602=69 L T 585=42 W R 165.

tion of sovereignty by the British Government, the pre-British watan grant was recognized: see *Secy. of State* v. *Bai Rajbai*[4] and *Vajesingji Joravarsingji* v. *Secy. of State.*[5] There is no evidence as to when the nadgirs' watan was formally recognized prior to the inam enquiry. It is argued that, at any rate, the conduct of the jahagirdars implies that they had accepted the position of trustees. In order that the statute of limitation might be ousted, there must be a direct trust constituted by the act of parties and not a constructive trust arising by implication of law. The jahagirdars cannot be affected by the plea unless it was found proved that they were persons in whom confidence had been reposed and who had thereby come into the enjoyment of the property as the result of that confidence and to whom a Court of Equity would make accountable to the nadgirs as persons entitled to the beneficial enjoyment of the property. I am satisfied beyond doubt that neither the ruling power prior to the grant nor the jahagirdars subsequent thereto were entrusted with the possession of this property in the manner suggested. The mere assumption of management by a sovereign power of lands on failure to pay the customary judi is not, I think, tantamount to 'vesting' in trust of such lands under S. 10, Lim. Act. The words "in trust for a specific purpose" in that section must obviously receive a restrictive interpretation. Assuming that the lands were freely surrendered by the nadgirs into the possession of the ancient rulers or the grantees through them on account of their inability to pay the customary judi, the payment of which was the essential condition of the tenure, that surrender whether voluntary or not will not necessarily create a trust of the limited character and nature attaching to property within the meaning of S. 10, Lim. Act. In that view the suit to recover possession of property claimed as the absolute property by the jahagirdars since 1864 or even prior to that date was barred at the date of the suit. It is impossible to agree with the learned trial Judge that the jahagirdars had made no open hostile assertion of their claim to this property. That assertion is evident from the numerous documents on the record and the attitude adopted by the parties before and after the enquiry under Act 11 of 1852. Therefore the plaintiffs' claim fails. The above finding is decisive of the case; but as argument has been heard as to the effect of certain decisions upon the questions now raised, it will be useful to express my view thereon.

In the earlier suits, viz. Suit No. 730 of 1858 and Suit No. 1154 of 1859, the dispute was with regard to 1 mar 14 annas and 11 mars respectively between the plaintiffs' ancestors and the jahagirdars. Those decisions are not directly relevant to matters in issue in the absence of any means of ascertaining whether the identical property in dispute in those suits is comprised in the dispute in the present litigation. In one of the later suits of 1859, the Court held that there was no evidence to identify the lands in dispute as part of the watan property. I have already referred to the suit of 1868 which affected 22 mars which are not the subject matter of the present litigation. The finding proceeded on the assumption that in 1868, having regard to the previous acknowledgments and offers, the claim to possession was not barred. The matter rested entirely on a different footing in the suit instituted in 1924.

The Suit No 6 of 1893 was instituted by the nadgirs for a declaration that they were the watandar patils and kulkarnis and were entitled to perform service. It was dismissed on the ground that a suit for a mere declaration was not maintainable.

Suit No. 177 of 1903 which was instituted after the Collector's order to obtain a decision from the Court regarding the rights of parties to the watan was not decided on the merits as it was withdrawn It is to be noted that in 1904 another suit was instituted by the nadgirs (No. 353 of 1904) to recover possession of certain properties and for accounts. The accounts did not relate to the specific properties which are the subject matter of the present suit. The decision in the suit cannot possibly operate as res judicata.

The one instituted prior to this suit was Suit No. 2 of 1913 which ended with the decision of the Privy Council in favour of the jahagirdars in some respects. The learned counsel for the latter has relied upon that decision in support of his case. On the nature of the jahagirdars' possession it has been urged on behalf of the plaintiffs that the Privy Council decision does not affect the claim of the plaintiffs inasmuch as the only representative of theirs to that suit, and who was plaintiffs' father, was respondent 3 in the appeal to the Privy Council and he died before the appeal was heard and decided and no steps were taken to bring his legal representatives on the record. It is important to note that in the suit filed by the senior jahagirdars, the present defendants 12 and 13 who were defendants 1 and 6 in that suit had joined in the prayers of the plaintiffs for a declaration that the jahagirdars were the watandars, kulkarnis and patils. The junior branch of the nadgirs was represented by plaintiff 1's father. There is no doubt that he had identified himself with the principal defendant (the Secretary of State) in that suit in maintaining that the jahagirdars were not the representative watandars and were not entitled to hold the watan lands as their private property. Ordinarily, the junior members of the nadgir family would be bound by that decision. Where persons litigate bona fide in respect of a private right claimed in common for themselves and others, all persons interested in such right are to be deemed to claim under the persons so litigating : *see* Expln. 6 of S. 11, Civil P. C. Before the decision of the Privy Council was reached, and some time before the present suit was filed, plaintiff 1's father died. The only indication of that fact is contained in the rejoinder submitted by the plaintiffs to the defendants' application, made subsequent to the decision of the Privy Council appeal, to raise an issue as to the effect of that decision upon the contention of the parties—*vide* Ex. 203. No further evidence was led as to the fact of the death of the plaintiffs' father. An issue was framed by the trial Court in terms of the defendant's application. It is now urged that upon the death of respondent 3 the whole appeal abated and that therefore the only decree binding upon the legal representatives would be the decree of the High Court dismissing the jahagirdars' suit. It was also urged that the effect of that dismissal was that the jahagirdars held the lands as watan property in their hands liable to contribution for the remuneration of the watandars. In consequence it was contended that even if the plaintiffs failed to prove an express trust, the position of the defendants would be analogous to trustees and not adverse to the plaintiffs. It is difficult to follow that reasoning. Under the heading "Decree for or against a dead person" in the notes to O. 22, R. 4, Civil P. C., the following statement appears in the Commentary on the Civil Procedure Code by Sir Dinshaw Mulla at p. 868, Edn. 10 :

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[4] A I R 1915 P C 59=30 I C 303=42 I A 229 =39 Bom 625 (P C).

[5] A I R 1924 P C 216=82 I C 779=51 I A 357 =48 Bom 613 (P C).

> By reason of a statute of 1833 (3 & 4 Will. IV, c. 41, S. 23), a decree passed by the Privy Council against the respondents in ignorance of the death of one of them is not a nullity, though the legal representative of the deceased was not brought on the record, the decree being an order of the Sovereign.

That expresses the correct view in regard to the decree passed by the Privy Council. There is, I think, no substance in the contention of the plaintiffs that the appeal abated so far as the plaintiffs' father's interest was concerned. Even if it were so, I do not think the decision of the High Court which was reversed by the Privy Council could be given the effect suggested on behalf of the plaintiffs. In the view I take of the matter, the decision of the Privy Council creates an effective bar to the plaintiffs' claim in this suit. It was certainly open to the representatives of the junior branch to contest the position taken up by the jahagirdars and they appear to have done that. In consequence, that decision must operate as res judicata on the question of the character of the property in dispute in the jahagirdars' hands.

For the above reasons, I would allow this appeal, reverse the decree of the lower Court and dismiss the plaintiffs' suit with costs throughout.

Broomfield, J.—The lands which the nadgir plaintiffs seek to recover in this suit as part of their watan had been for many years under attachment even at the time of the grant of the village of Hebli to the ancestors of defendants 1 to 10 in 1748. Between that year and the introduction of the British Rule into this part of the Dharwar district, it would seem that the lands were for a time or from time to time restored to the possession of the nadgirs. There is very little reliable evidence as to this period and what there is is obscure. But from about 1830 onwards, at any rate, the jahagirdars have been continuously in possession and all the attempts of the nadgirs to get back the lands have been unsuccessful.

The jahagirdars did not at first repudiate the title of the nadgirs entirely. They showed the lands in their accounts as "kamavishi," and, whatever the exact meaning of that expression may be, it certainly indicated some distinction between these lands liable to pay judi only and the "khalsat" lands which belonged to the jahagirdars absolutely (*see* the discussion of the word "kamavishi" in *Ramchandrrav Raghunath* v. *Bhisto Shankar Nadgir*[6] at p. 50). In 1832, when the Company's Government called upon the jahagirdars to define their position in reply to complaints made by the nadgirs, they admitted that the lands were not khalsat but kept amani for non-payment of judi—Ex. 298. In 1844, while repudiating the allegation that they had wrongfully dispossessed the nadgirs and stating that the latter had handed over their watan lands of their own free will, they expressed their willingness to restore the lands if the nadgirs were prepared to fulfil their obligations—Ex. 296. In the accounts of this period we find a statement (Ex. 299 of the year 1843-44) that the nadgirs had given up the lands ('*vopun dile*') on the understanding that they would pay the arrears of judi on resumption of their watan, though in Ex. 300 which relates to the previous year the entry is simply that the lands other than those kept for maintenance had been given up for cultivation as ryotwari lands, nothing being said about resumption.

In the jaminzada of 1856—Ex. 309—it is stated that the lands handed over by the patils (i. e. the nadgirs) as they could not pay judi, though entered as kamavishi, were being treated as khalsat, and only the remainder 7¼ mars out of 200 mars were enjoyed by the patils on payment of judi. In the same year we find the nadgirs submitting a memorial to the Governor in Council (Ex. 336) complaining that the jahagirdars were unlawfully dealing with the watan as if it were their private property and praying that Government should hold an enquiry and settle the watan on a proper basis. In 1862—Ex. 333—the jahagirdars put forward the claim that they had been in enjoyment of the watan lands since the grant of the village to them. It is clear, therefore, that their attitude had changed and from about the middle of the 19th century they repudiated the nadgirs entirely and claimed the suit lands for themselves. It is admitted—Ex 339—that from 1840 onwards, they had refused to allow the nadgirs to officiate as revenue patils and kulkarnis.

In 1862, Major Etheridge, Alienation Settlement Officer and Inam Commissioner, had decided on the evidence then before him that the suit lands were kadim, i. e. watan property, of the nadgirs. But in 1864, after further enquiry, he recommended to Government that the kamavishi management of the jahagirdars had assumed a permanency of tenure which could not justly be interfered with. He suggested that 7¼ mars and 3 bighas of the nadgirs' land should alone be made amenable to settlement as held from Government and that the remainder should belong to the Heblikar, i. e. the jahagirdar—Ex. 161. Government accepted this recommendation and the Privy Council have held, in *Laxmanrao Madhavrao* v. *Shrinivas Lingo*,[2] that this amounted to a valid adjudication under Act 11 of 1852.

From this time forward at any rate the jahagirdars' possession of the suit lands must be taken to have been in open and complete denial of the rights of the nadgirs, and throughout the litigation which commenced in 1858 and has continued at intervals ever since, their attitute has been quite uncompromising. See, for instance, Ex. 106 which is the written statement in Suit No. 177 of 1903 filed by the father of the present plaintiff 1 against the jahagirdars for a declaration of his right to the watan. It was there stated :

> The plaintiff is not a patilki and kulkarniki kadim watandar of Hebli as alleged by him and he is not in possession of any watan property as such. The patilki and kulkarniki watan lands of Hebli and all the haks appertaining to the patilki and kulkarniki services have been in long and continuous enjoyment of the defendants' families along with other jahagirs since the time of the grant of the whole jahagir and so the defendant's families have been since that time officiating as patils and kulkarnis in their own right through their deputies and karkuns to the knowledge of the plaintiffs' family and to the exclusion of their alleged right.

The plaints in the various suits by the nadgirs, whether they alleged forcible dispossession or delivery on some sort of trust, are all clear admissions that the possession of the jahgirdars was in denial and defiance of their claim. After 1861 or 1865 at the latest, the lands ceased to be described as kamavishi in the village accounts. How the learned trial Judge could say that there is no good evidence of any active assertion of a hostile title to the knowledge of the nadgirs, I am unable to understand. A clearer case of adverse possession it is difficult to imagine.

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[6] (1876) P J 47.

The plaintiffs' suit must be barred unless they can get out of the law of limitation by praying in aid S. 10, Limitation Act, i. e. unless they can prove that the suit lands were vested in the defendants in trust for a specific purpose. They founded their case in this respect on certain alleged admissions of the jahagirdars and entries in their accounts. I have referred to the principal documents relied on in this connexion; and as my learned brother has discussed the matter in detail, I shall be very brief.

The description of the lands in the accounts as kamavishi may be regarded, as long as that description was used, as an acknowledgment that the rights of the nadgirs were not extinguished. But it cannot by itself connote a trust for a specific purpose, or indeed anything in the nature of a trust. The same applies to the expressions "kept amani" and "*vopun dile*". These expressions might no doubt be used in connexion with a trust for a specific purpose, but they do not necessarily imply anything of the sort. Moreover, it would in my opinion be unsafe and unreasonable to stress these statements unduly against the jahagirdars. It is not shown and cannot be presumed that they had any personal knowledge of the circumstances in which the nadgirs gave up their lands. Apart from that, however, the evidence is much too hazy and uncertain. When the alleged trust was created, who the parties were, what the terms were, all this is left to mere speculation.

The learned trial Judge thinks the case is similar to *Vithal Vishvanath Prabhu* v. *Ramchandra Sadashiv Kirkire.*[7] It was held in that case that where immoveable property was given into the possession of the defendant to sell the crops, to pay the Government dues, and to account for the profits to the plaintiff on his claiming them, the defendant was not a depository but a trustee of the property. The learned trial Judge says:

> Similarly, I think in this case, the lands were given to the jahagirdars for management. The jahagirdars were interested in taking over the management as judi was payable to them every year, and it used to fall in arrears. They were to let the lands out and pay themselves the judi. If there was a deficit, they were to reimburse themselves from other cesses due to the nadgirs. It follows that they were to account for the excess, if any, remained with them if the nadgirs demanded that.

But obviously what made it a trust in *Vithal* v. *Ramchandra*[7] was the express provision that the person in possession was to account for the profits to the owner on his claiming them. In the present case, whatever the value of the evidence may be, it does not even purport to show that the jahagirdars were under any obligation to account for the management of their lands. Mr. Desai, the learned advocate for the respondents, says that in *Ramchandrrav Raghunath* v. *Bhisto Shankar Nadgir*[6] this High Court on the same evidence held that there was a trust. But that was not so. It was held that the jahagirdars had acknowledged the title of the nadgirs and that as the lands were described as kamavishi within 12 years of the suit, their possession had not been adverse for the statutory period. The fact that the 12 years' period of limitation was applied, shows that the theory of a trust for a specific purpose was negatived. Sir Charles Sargent was not prepared to find as a fact that there was any express agreement between the parties at all. He thought it more probable that the nadgirs' right of redemption

> was founded upon the custom of the country, which is always favourable to the preservation of the official emoluments of hereditary districts and village officers.

In my opinion the plaintiffs have completely failed to bring the case within the ambit of S. 10.

I should say a word or two on Mr. Desai's technical argument based on the recent decision of the Privy Council in *Hodge* v. *Marsh.*[8] He says that the plaintiffs' father was the only representative of the interests claimed by the present plaintiffs in the Privy Council appeal in Suit No. 2 of 1913 (*Laxmanrao Madhavrao* v. *Shrinivas Lingo*[2]); that he was dead at the time the judgment was delivered and his heirs had not been brought on the record; that, therefore, the appeal as against him abated; and the result is that the judgment of this Court in that case (*Shrinivas* v. *Secy. of State*[1]) still stands so far as the present plaintiffs are concerned. He, therefore, relies on that judgment as showing that the jahagirdars' possession of the watan lands was not adverse to the nadgirs. This argument assumes that the provisions of the Civil Procedure Code apply to appeals before the Privy Council. But this is not so—see S. 112 of the Code. S. 23 of 2 & 3 Will. IV, c. 41, provides that the decision of the Judicial Committee shall have full force and effect notwithstanding the death of any of the parties interested therein: *see Deonandan Prasad Singh* v. *Janki Singh*,[9] *Kalyani Pillai* v. *Thiruvenkataswami Ayyangar*[10] and *Sri Chandra Chur Deo* v. *Mt. Shyam Kumari.*[11]

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[7] (1870) 7 B H C R A C 149.

[8] (1936) 38 Bom L R 680 (P C).

Even if it were the case, however, that the appeal did abate as against the present plaintiffs, the decree of this Court dismissing the jahagirdars' suit—the suit being for a refund of the amount which Government had levied as contribution for the remuneration of the officiating watandars, —cannot in any way assist the plaintiffs' case. It is quite true that Macleod, C. J.'s judgment in *Shrinivas* v. *Secy of State*[1] shows that he differed from the trial Court on the question of adverse possession and was of opinion that the jahagirdar plaintiff had not made out his case in that respect. It is doubtful, however, whether this finding was necessary for the decision of the case, and anyhow it is clear that the issue as to adverse possession did not arise in the same form. The issue in that case was whether the jahagirdar plaintiff had established his claim to be watandar by adverse possession. The issue here is whether the nadgirs' claim to recover the watan lands is barred by the jahagirdars' adverse possession of those lands. That is quite a different matter. There can be no question of res judicata.

In the view we take of the case, it is not necessary to consider the effect of the Government orders in 1864 as against the nadgirs. However, a few observations on that part of the case may not be out of place. With all deference to my learned brother I think there is great force in the argument of the learned counsel for the appellants that these orders are just as much binding on the nadgirs as on the jahagirdars and a complete answer to the suit. The trial Court has found that the enquiries made by the Inam Commission related only to the claims made by the jahagirdars and that the nadgirs were not parties. That no doubt is in accordance with the opinion expressed by this Court both in *Ramchandrrav Raghunath* v. *Bhisto Shankar Nadgir*[6] and in *Shrinivas* v. *Secy. of State.*[1] But on the main question whether Major Etheridge's order as confirmed by Government was a valid adjudication under Act 11 of 1852, the Privy Council in *Laxmanrao Madhavrao* v. *Shrinivas Lingo*[2] has differed from this Court and held that it was so; and, in view of that, I find the greatest difficulty in holding that it was valid only as between Government and the jahagirdars. The argument is that the Inam Commission was only concerned with claims against Government and not with disputes between private persons such as those between the nadgirs and the jahagirdars. But as a matter of fact they were both claiming as against Government. They both held or claimed under pre-British grants, and the plaintiffs' watan no less than the defendants' jahagir required Government's recognition: see *Secy. of State* v. *Bai Rajbai*[4] and *Vajesingji Joravarsingji* v. *Secy. of State.*[5] There is nothing on the record of this case to suggest that both claims would not equally come within the purview of the Inam Commission. The order of 1864 contains a recommendation as regards the plaintiffs' watan that "7¼ mars and 3 bighas should be alone made amenable to settlement as held from Government". This part of the recommendation, as well as that relating to the rest of the watan which was held to belong to the jahagirdars, received Government's approval, and according to the reasoning of the Privy Council, it must also be regarded as an adjudication under the Act of 1852, at any rate if the nadgirs were parties to the proceedings. Major Etheridge's proceedings are no longer available, but it is not unreasonable to assume at this length of time *omnia rite esse acta* and that the nadgirs had due notice. Even from the evidence we have, it seems to me sufficiently clear that they were just as much parties to the enquiry as the jahagirdars. I may refer especially in this connection to Exs. 154, 336 and 333. Ex. 336 is a petition by the nadgirs that Government would settle their watan and as it bears the seal of the Inam Commission, it was evidently forwarded to that body for disposal. It is true that the Privy Council have not stated in so many words that the order of 1864 was binding on the nadgirs, but their finding that there was an adjudication under Act 11 of 1852 securing the revenue of the suit lands to the jahagirdars can scarcely mean anything else. Of course a valid adjudication under the Act must bind all the parties to the enquiry. Under R. 2 of Sch. A, the orders of Government are final. *See also* S. 1, Bombay Hereditary Offices Act.

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[9] A I R 1920 Pat 89=56 I C 322=5 Pat L J 314=1 P L T 325.

[10] A I R 1924 Mad 695=80 I C 85=47 Mad 618 =45 M L J 154.

[11] A I R 1932 Pat 261=139 I C 397=11 Pat 445 =13 P L T 719.

Quite independently of this point, however, I agree with my learned brother that the appeal succeeds and the suit falls to be dismissed.

D.S./R.K. *Appeal allowed.*

A. I. R. 1937 Bombay 446

BEAUMONT, C. J. AND N. J. WADIA, J.

Babubhai Girdharlal and *others* — Plaintiffs — Appellants.

v.

Ujamlal Hargovandas and *others* — Defendants — Respondents.

First Appeal No. 354 of 1932, Decided on 21st January 1937, from decision of First Class Sub-Judge, Ahmedabad, in R. C. Suit No. 139 of 1929.

Hindu Law — Joint family—Property purchased by member — Presumption — Mere possession of joint family property at date of purchase is not enough to raise presumption that property acquired is joint family property—Nucleus of joint family property must be such as is enough to enable member to make acquisition — Person alleging property to be joint must prove this.

Under Hindu law it is not to be presumed from the mere existence of a joint family that there is any joint family property. There is also no presumption that property which belongs to a member of a joint family is joint family property. The burden of proving that certain property purchased by a member of the joint family is joint family property lies on the person who so alleges it. [P 447 C 1]

But if there is a joint family, which possesses a nucleus of joint family property, the property acquired by a member of that family is presumed to be joint family property. The nucleus of the joint family property necessary to give rise to such presumption must be family property from which the purchase money for the property in dispute must have been derived wholly or at any rate in considerable part. The mere possession of joint family property at the date of the purchase of the property in dispute is not enough to raise the presumption that the property in dispute is itself joint family property. If it is shown that the only joint family property existing at the date of the acquisition of the property in dispute was of such a nature that it could not possibly have been the means of acquiring the property in dispute, then the presumption that the property in dispute is joint family property does not arise: *A I R 1930 Mad 662, Rel. on*; *29 All 244 (P C), Disting.* [P 447 C 1]

M. B. Dave and *P. A. Dhruva*—for Appellants.

N. H. C. Coyajee, N. N. Majumdar (for No. 1) and *I. B. Desai* (for Nos. 2 to 4)—for Respondents.

Beaumont, C. J.—This is an appeal from a decision of the First Class Subordinate Judge of Ahmedabad. The plaintiff sues for partition of joint family property. One Hargovandas was the father of the plaintiff, of his brother defendant 1, and of one Manilal who died before the suit leaving defendants 2 to 4, his sons. The plaintiff's contention is that Hargovandas and his sons when living constituted a joint Hindu family, and he claims to be entitled to one-third of the joint family property. His claim that he is entitled to one-third of the joint family property is not disputed, but the question which arises on this appeal is whether a house described in the plaint as property "B" is joint family property, or was separate property of Hargovandas in which case it was disposed of under his will, and the plaintiff takes no interest. The learned Judge held that the house was separate property of Hargovandas, and in this appeal the plaintiff contests that finding.

The house in question was acquired by Hargovandas by two purchases, one made on 1st January 1888, when property was acquired for Rs. 641, and the other made on 4th February 1893, when property was acquired for Rs. 999. Those properties were ultimately amalgamated and formed property "B".

Now on the evidence, to which I will refer in a moment, it is not in my opinion shown how the purchase money for those two purchases was acquired by Hargovandas, and there being no evidence as to how the purchase money was acquired, the question is on whom is the burden of proving that the property was separate or joint. Whoever has to discharge the burden of proof has failed. The law, I think, is clearly established that from the existence of a joint family, it is not to be presumed that there is any joint family property. There is no presumption that property which belongs to a member of a joint family is joint family property. The plaintiff in setting out to prove that property "B" is joint family property must in the first instance discharge the burden of proving that fact. But it is also established that if there is a joint family, which possesses a nucleus of joint family property, then property acquired by a member of that family is presumed to be joint family property. But the question arises what is meant by a nucleus.

In my opinion the nucleus of joint family property necessary to give rise to the presumption must be family property from which the purchase money for the property in suit might have been derived wholly, or at any rate in considerable part. It is not in my opinion enough to prove, as Mr. Dave has contended in this case, that the mere possession of joint family property at the date of the purchase of the property in suit is enough to raise the presumption that the property in suit is itself joint family property. It would, I think, be unfortunate if the Court was bound to presume that something had occurred, which on the evidence could not possibly have occurred, and if it be shown that the only joint family property existing at the date of the acquisition of the property in suit was of such a nature that it could not possibly have been the means of acquiring the property in suit, then in my opinion the presumption that the property in suit is joint family property does not arise. I think that the law as stated in Sir Dinshaw Mulla's book on Principles of Hindu Law, Edn. 8, p. 256, in the last paragraph of S. 233, is rather too widely stated. The Privy Council case on which the author relies, viz. *Lal Bahadur* v. *Kanhaia Lal*,[1] was a case in which there was a substantial nucleus of joint family property at the date of the purchase therein in question, out of which the suit property might have been acquired. I think that the law is accurately stated by Ananthakrishna Ayyar, J. in *Sankaranarayana* v. *Tangaratna*.[2] (After discussing the evidence his Lordship proceeded.) In my opinion the burden originally was on the plaintiff, and he has not succeeded in shifting that burden merely by showing that at the date of the purchase Hargovandas had vested in him joint family property, since the evidence shows that such joint family property could not possibly have been used for the purpose of acquiring this property. I think therefore that the plaintiff fails to discharge the burden of showing that property "B" at the date of its purchase became joint family property.

Then it is said that if the property was not originally joint family property, it was blended by Hargovandas with the admitted joint family property, and at his death it had therefore become joint family property. It is no doubt the law that if a man treats his own property as part of the joint family property, he is presumed to have thrown the whole amount into one common stock. (After further discussing the evidence his Lordship came to the conclusion that property "B" was not blended by Hargovandas with the other admitted joint family property, and concluded.) In my opinion the judgment of the learned Judge was right, and the appeal must be dismissed with costs.

N. J. Wadia, J.—I agree.

A.L./R.K. *Appeal dismissed.*

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[1] (1906) 29 All 244=34 I A 65=4 A L J 227 (P C).

[2] A I R 1930 Mad 662=126 I C 609.

A. I. R. 1937 Bombay 447

KANIA, J.

Tulsidas Mavji — Plaintiff.

v.

Advocate-General, Bombay—Defendant.

Suit No. 750 of 1936, Decided on 6th November 1936.

Will—Construction—It is unsafe to rely on words used in another will, while construing particular will, unless they are identical — Words 'any other object of Dharam' held should be read as 'any other similar charitable or religious object'.

In construing a particular will, it is generally unsafe to rely on the words used in another will unless the whole scheme of the two wills is found to be identical. [P 448 C 2]

A will contained the following clause :

"Further my executors shall appropriate (utilize and spend) a sum of Rs. 3,000 towards some 'sadavart' or building 'dharamashala' or well, tank or havada (water trough) or towards feeding 'sadhus' and ascetics or spend the same towards any other object of 'dharam' (religious or charitable purpose) in order to perpetuate the memory of my wife . .":

Held : that the last words 'any other object of dharam' should be considered ejusdem generis and they clearly indicated the general intention of charity on the part of the testator and therefore they must be read as "any other similar charitable or religious object" : *In re Ludlow (Baron)*; *Bence-Jones* v. *Attorney General, (1923) 93 L J Ch 30, Rel. on.* [P 448 C 2]

C. K. Daphtary — for Plaintiff.

Murzban J. Mistree —for Defendant.

Order.—By this Originating Summons a clause in the will of the deceased testator is sought to be construed. The will does not appear to be drafted by a lawyer and has been written out in Gujarati by the deceased himself. After making diverse provisions, the particular clause in the will runs as follows :

> Further my executors shall appropriate (utilize and spend) a sum of Rs. 3,000 towards some 'sadavart' or building 'dharamashala' or well, tank or havada (water trough) or towards feeding 'sadhus' and ascetics or spend the same towards any other object of 'dharam' (religious or charitable purpose) in order to perpetuate the memory of my wife, Putlibai who is dead.

On behalf of the plaintiff, who is the executor and also residuary legatee, it is contended that by the use of the word "or" between the various objects mentioned, the clause has become disjunctive and the executor cannot be charged with committing a breach of his duty if he utilized the fund for any one of the objects mentioned or for the purposes falling under the last alternative. It is urged that as the word "dharam" is used in the last alternative, if the executor spent the amount on any benevolent object (which according to the construction given to that word by the authorities would be covered by the word "dharam"), it would not be considered that he had acted wrongly. Therefore, the bequest is void on the ground of uncertainty. In support of that contention, reliance is placed on the decisions in (1923) 1 Ch 225[1] and 40 Cal 232.[2] On the other hand, on behalf of the Advocate-General, it is contended that the decisions in (1920) 1 Ch 305[3] and 93 L J Ch 30[4] show that under similar circumstances the last words should be considered ejusdem generis.

In my opinion, in construing a particular will, it is generally unsafe to rely on the words used in another will unless the whole scheme of the two wills is found to be identical. The highest authorities and most eminent Judges have recognized the danger of trying to follow one decision in respect of the construction of a document, without observing the context or the exact scheme of the document, in another case. The nearest case out of those cited is 93 L J Ch 30[4] and if that is accepted as a guide, it favours the construction urged by the Advocate-General.

In my opinion the proper course to follow is to bear in mind that this testator had made his own will and by the words used in the particular clause had clearly indicated his desire to set apart this sum to perpetuate the memory of his deceased wife. He had mentioned several objects, all of which considered individually were either religious or charitable. He had given the option to the executor to select any one of those and added thereafter that the executor may also select any other object of "dharam." These last words clearly indicate that his intention was that if the executor thought fit to apply the fund to none of the objects indicated, he had the option to apply the same to any other object of his own selection, but the general intention of charity is clearly there. The last words, under the circumstances, in my opinion, should be read as if they were : "or any other similar charitable or religious object". I recognize that the word "other" is not in fact written in the will, but reading the clause as a whole, and bearing in mind the circumstances and the intention of the testator, the context clearly indicates that the clause should be read with that meaning attached to this word. Costs of both the parties as between attorney and client to come out of this fund.

K.B./A.L. *Order accordingly.*

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1. *In re* Davis; Thomas v. Davis, (1923) 1 Ch 225 =92 L J Ch 322=128 L T 735=67 S J 297= 39 T L R 201.
2. Sarat Chandra Ghose v. Pratap Chandra Ghose, (1912) 40 Cal 232=7 I C 641=11 Cr L J 512=11 C W N 18=12 C L J 294.
3. *In re* Benett ; Gibson v. Attorney-General, (1920) 1 Ch 305=89 L J C H 269=122 L T 578=84 J P 78=64 S J 291.
4. *In re* Ludlow (Baron) ; Bence-Jones v. Attorney-General, (1923) 93 L J Ch 30 = 156 L T Jo 440=(1923) W N 314.

A. I. R. 1937 Bombay 449

BROOMFIELD AND WASSOODEW, JJ.

Krishnaji Nilkant Pitkar —
Plaintiff—Appellant.

v.

Secretary of State—Respondent.

Second Appeal No. 175 of 1933, Decided on 11th January 1937, from decision of Dist. Judge, Thana, in Appeal No. 84 of 1932.

(a) Practice—Pleadings—New plea — Pleadings should be definite — Question of law affecting validity of decree not expressly pleaded in pleadings—Question can be raised for first time in appeal if it can be raised upon substance of pleadings.

A party can succeed only upon a definite plea set up in defence or in the plaint. But every variance between pleading and proof is not always fatal. The test is whether the other party would be taken by surprise if relief were granted on the basis of the new point raised. The fact that the pleadings in the muffasil are inartistically drawn up does not warrant the departure from the rule that a plaintiff must be held to the state of facts and equities alleged and pleaded by him or involved in or consistent therewith. This rule applies with equal force to the defendant. [P 450 C 2; P 451 C 1]

A question of law affecting the validity of a decree though not expressly pleaded in the pleadings can however be allowed to be raised for the first time in appeal if the question can be raised upon the substance of the pleadings and is not inconsistent with it : *A I R 1923 Cal 142* and *33 Bom 35, Rel. on*; *A I R 1936 Bom 19, Disting.* [P 451 C 2]

(b) Government of India Act (1919), S. 30 —Scope —Provisions of S. 30 are mandatory.

The provisions of S. 30, Government of India Act, 1919, are mandatory and must be strictly complied with in order to constitute a valid contract which could be enforced against the Secretary of State. According to the provisions of the law and the rules in force, the contract must be by a deed executed on behalf of the Secretary of State and in his name by the proper authority : *A I R 1936 Bom 19*; *A I R 1934 Bom 277* and *29 Bom 580, Rel. on.* [P 451 C 2]

(c) Government of India Act (1919), S. 96-B (1) — Scope — Persons in service of Crown can be dismissed at will of Crown in spite of contract to contrary unless Crown has deprived itself of its power in some way recognized by law—This power includes also power to refuse to employ person accepting offer of employment.

Every person in the civil service of the Crown is liable to be dismissed at the will and pleasure of the Sovereign notwithstanding a contract to contrary unless the Crown has deprived itself of its prerogative in some way expressly recognized by law. [P 451 C 2: P 452 C 1]

The power to dismiss an employee at pleasure involves the power to refuse to employ a person accepting an offer of employment. If the former can be claimed as one of the prerogatives of the Sovereign, it is logical to assume that a similar protection can be claimed for breach of an agreement to employ, for the prerogative can be effectively set up immediately upon acceptance of the offer of employment. It cannot be denied that dismissal without notice is tantamount to summary determination of the contract. It is difficult to distinguish that privilege to terminate a contract of service at will from the refusal to accept service, for the latter involves in equal degree a summary determination of the contract. The pleasure of the Sovereign if unrestricted by statute can be expressed at any stage of the contract. *Dunn* v. *Queen*, *(1896) 1 Q B 116*; *Shenton* v. *Smith*, *(1895) A C 229*; *Grant* v. *Secy. of State for India*, *(1877) 2 C P D 445* and *A I R 1936 Bom 19*, *Rel. on.* [P 452 C 1, 2]

N. H. C. Coyajee and *M. N. Oka* — for Appellant.

K. Mc I. Kemp, *Advocate-General* and *B. K. Desai* — for Respondent.

Wassoodew, J. — The plaintiff-appellant, who was a goods guard serving at Kalyan in the G. I. P. Railway, instituted this action against the Secretary of State for India in Council essentially to recover Rs. 1,873 as damages for breach of contract to re-employ him implied in the Communique issued under the instructions of the Member of Commerce and Industry of the Government of India containing the terms of settlement of the dispute then pending between the Railway Administration and its employees. The material facts are these. In the beginning of February 1930, there was a general strike of Railway employees which was joined by the plaintiff. Soon thereafter there were negotiations between the All-India Railwaymen's Federation on behalf of the employees and the Member of Commerce and Industry. In those negotiations there was a settlement of the dispute and the terms of that settlement were embodied in a Communique, the substance of which is as follows :

> The Railway Administration will not refuse to take back into service any employee merely because he went on strike. Every employee who offers to return to duty on or before 15th March 1930 will be allowed to do so provided that the post he held when he proceeded on strike has not been permanently filled and provided that he was not discharged for other reasons than the strike. A list will be maintainted by the Agent, G. I. P. Railway, of all employees who offer to return to duty within the prescribed period and who are not able to do so by reason of the fact that the posts held by them have been permanently filled. Each employee whose name is on this list will be offered the first refusal of employment in the same or in a corresponding position to that which he had held when he proceeded on strike, against vacancies which occur in the future on the Great Indian Peninsula Railway, East Indian

> Railway and North Western Railway. Any employee who declines to accept the offer of employment on the Great Indian Peninsula Railway will be removed from the list. Any employee who declines to accept an offer of employment on the North Western Railway or the East Indian Railway will be transferred to a second list and will be offered appointment on the Great Indian Peninsula Railway after all employees on the first list have been offered employment.

The plaintiff presented himself for duty before the expiry of the date prescribed in the said Communique, and his name was entered in the waiting list on the plea that his post had been permanently filled during his absence. The plaintiff alleged that he was entitled to be re-employed forthwith in terms of the offer as the plea put forward was false and that as several outsiders were subsequently employed in vacancies that occurred, there was breach of contract entitling him to damages. It may be noted that after this suit was instituted, the plaintiff was re-employed by the Railway Administration as a guard in the C grade. Both the Courts below have held that the plaintiff's post was permanently filled, and with that finding of fact we cannot interfere in second appeal.

The learned trial Judge also found that there was no breach of the terms of the offer inasmuch as the plaintiff was sixteenth in the waiting list, and the Railway Administration had filled up fifteen vacancies only. The District Judge in first appeal did not agree with that finding, and, for the reasons given by him he, came to the conclusion that seventeen appointments in all were made in contravention of the Communique and that eight others were not shown by the plaintiff as alleged to have been made in contravention of it. But he dismissed the plaintiff's claim on the ground that there was no contract enforceable against the Secretary of State upon which the plaintiff could sue by reason of the provisions of S. 30, Government of India Act.

There can be no doubt that the Communique referred to represented the terms of the offer on behalf of the railway to employ the persons on strike and the presentation of the plaintiff for duty constituted the acceptance of that offer. Therefore, prima facie, all the ingredients of a completed contract are present in the case.

The learned counsel for the appellant has contended, first, that in the absence of a specific plea upon the question of the binding nature of the contract in the written defence of the Secretary of State, there was no justification for entertaining the objection in first appeal, as the learned District Judge had done, and, secondly, that as the refusal to employ the plaintiff in terms of the offer constituted breach of contract as held by the District Judge, the Secretary of State could not take shelter under the plea that the prerogative of the Crown relating to contracts of service protected his act in question, for, according to the learned counsel, that prerogative is not absolute and in the present case limited by the rules framed by the Railway Board in virtue of the powers conferred on it under S. 2, Railway Board Act 4 of 1905, for the purposes of S. 47, Railways Act.

In support of his first contention the learned counsel has relied upon the decision in 60 Bom 42[1] wherein this Court refused to consider the point based upon S. 30, Government of India Act, which was raised for the first time in the Court of Appeal, in the absence of any definite pleading relating to the binding nature of the contract in question. S. 30 (1) (2), Government of India Act provides, that every contract made on behalf and in the name of the Secretary of State in Council shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorizes, and, if so executed may be enforced by or against the Secretary of State in Council. The absence of such a contract could legitimately have been pleaded in defence. The learned Advocate-General has argued that proper plea has been raised which was not the case in 60 Bom 42.[1] According to the pleadings the plaintiff in that case had alleged a definite agreement or compromise between himself and the Agent of the Secretary of State. The latter in the written defence had admitted that agreement and raised no question therein or at the trial as to its legality or binding force. It has always been regarded as a healthy rule of practice that a party can succeed only upon a definite plea set up in defence or in the plaint. But every variance between pleading and proof is not always fatal. The test is whether the other party would be taken by surprise if relief were granted on the basis of the new point raised : *see* 58 Cal 292.[2] The application of the rule has to be considered in connexion with the other circumstances of the case. Courts have in some cases allowed questions of law affecting the validity of the decree to be raised for the first time in appeal on the supposition that the question could be raised upon the substance of the pleadings. Making allowance for the fact that the pleadings in the muffasil are inartistically drawn up, that fact does not warrant the departure from the rule that a plaintiff must be held to the state of facts and equities alleged and pleaded by him or involved in or consistent therewith. That rule applies with equal force to the defendant. The following observations in 33 Bom 35[3] are important:

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[1] Secretary of State v. Yadavgir, A I R 1936 Bom 19=160 I C 505=60 Bom 42=37 Bom L R 931.

> A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.
>
> A Court of Appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never notice during the hearing of the suit.

That was a suit to obtain possession of certain land on the basis that it was the ancestral property of the plaintiff. The written statement never contested the ownership of the plaintiff and the defence was based upon adverse possession. The question of title was for the first time raised in appeal which was not allowed to be done because it was not taken when it might have been taken in defence.

The present case is distinguishable on facts. The plaintiff alleged a definite contract which he said was enforceable against the Secretary of State. In the written statement, Ex. 10, with reference to that part of the plaint it was pleaded as follows :

> The defendant denies that the plaintiff ever had any legal right to be reinstated because of the Government Communique and further that the defendant had ever agreed to reinstate him unconditionally or that the Communique of 1st March 1930 gave plaintiff any legal claim of suit against the defendant or that any damage was caused to the plaintiff by any act of the defendant as alleged in the plaint.

There is no reference expressly to the provisions of S. 30, Government of India Act; but by necessary implication the defendant questioned the legality of the contract which was sought to be enforced against him. The rule of pleadings contained in O. 6, R. 8, Civil P. C., relating to contracts is to the following effect :

> Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Here, there being an express denial of the legality or sufficiency in law of the contract, there is in substance a plea not inconsistent with the point raised in appeal. There is no reason therefore why this case should be dealt with on the analogy in 60 Bom 42.[1]

We think the learned District Judge properly dealt with the question as to whether the contract was affected by the provisions of S. 30, Government of India Act. The provisions of S. 30 to which I have already referred are mandatory and must be strictly complied with in order to constitute a valid contract which could be enforced against the Secretary of State. According to the provisions of the law and the rules in force, the contract must be by a deed executed on behalf of the Secretary of State and in his name by the proper authority : *see* 60 Bom 42[1]; 58 Bom 660[4] and 29 Bom 580.[5] The provisions of S. 30, Government of India Act in the view we take are a complete answer to the plaintiff's claim, in the absence of a contract in writing executed in proper form.

But apart from that point it seems to us that there is no good reason for sustaining the claim on the basis of breach of contract, assuming that the offer contained in the Communique and its acceptance by return to duty constitutes a binding contract. It cannot be denied that the Secretary of State in this matter represents the Crown. The G. I. P. Railway is a state-owned railway and is represented by the defendant, the Secretary of State. The Government of India Act, 1919, S. 96-B (1) provides that :

> Subject to the provisions of this Act and of rules made thereunder every person in the civil service of the Crown in India holds office during His Majesty's pleasure.

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[2] Ananda Chandra v. Broja Lal Singh, A I R 1923 Cal 142=74 I C 793=50 Cal 292=36 C L J 356.

[3] Nathu Piraji v. Umedmal Gadumal, (1908) 33 Bom 35=10 Bom L R 768.

[4] Municipal Corporation of Bombay v. Secretary of State, A I R 1934 Bom 277=152 I C 947=58 Bom 660=36 Bom L R 568.

[5] Municipal Corporation of Bombay v. Secretary of State, (1904) 29 Bom 580=7 Bom L R 27.

Therefore the plaintiff as a servant of the Crown would, if serving in the railway, be liable to be dismissed at the will and pleasure of the Sovereign, notwithstanding a contract to the contrary, unless the Crown has deprived itself of its prerogative in some way expressly recognized by law. Upon the authorities such as (1896) Q B 116,[6] (1895) A C 229[7] and (1877) 2 C P D 445,[8] Halsbury in his Laws of England (Vol. VI, Edn. 2, p. 608, para. 782) has based the following statement:

> Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown, and all in general are subject to dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained even though a special contract be proved.

The legal position was examined at great length in 60 Bom 42[1] and numerous authorities were considered. The legal position is therefore clear.

The question is whether it would make any difference in that position, first, because this is not strictly a case of dismissal of an employee already in service, but a refusal to employ a person to whom employment has been offered, and secondly because of the rules said to have been framed by the Railway Board dealing with the conduct of railway servants and regulating the management of the State-owned railway, which have been brought to our notice for the first time in this appeal. In my opinion the power to dismiss an employee at pleasure involves the power to refuse to employ a person accepting an offer of employment. If the former can be claimed as one of the prerogatives of the Sovereign, it is logical to assume that a similar protection can be claimed for breach of an agreement to employ, for, the prerogative can be effectivly set up immediately upon acceptance of the offer of employment. It cannot be denied that dismissal without notice is tantamount to summary determination of the contract. It is difficult to distinguish that privilege to terminate a contract of service at will from the refusal to accept service, for the latter involves in equal degree a summary determination of the contract. The pleasure of the Sovereign if unrestricted by statute can be expressed at any stage of the contract. The question seems to have been considered in 60 Bom 42,[1] where my learned brother Broomfield, J. has dealt with it as follows (p. 118):

> He has argued firstly that the cases cited are cases of wrongful dismissal, and his client he says is not claiming damages for wrongful dismissal but for the breach of the contract of re-employment. In my opinion, however, the case cannot be distinguished in principle from the one which would have arisen if the plaintiff had been dismissed on the date when he says he should have been re-employed. In fact legally the action for wrongful dismissal is an action for breach of the contract to employ.

It is difficult to resist the force of that reasoning. In regard to the supposed limitation of the prerogative, assuming that the rules relied upon are referable to the powers of the Railway Board under S. 2 of Railway Board Act, and therefore are in consonance with the provisions of S. 47 of Railways Act, it is clear that there is no limitation whatsoever in those rules in regard to the power of the Sovereign to refuse to carry out his offer of employment. Those rules are intended primarily for the conduct of railway servants already in employment. And moreover, there is an express reservation of the power of the Railway Administration to discharge a railway servant without assigning any reason. That reservation is thus expressed:

> Accordingly the power which the railway administration possess of discharging railway servants without assigning reasons in accordance with the terms of their agreement, or otherwise on reduction of establishment due to fluctuations of traffic, simplification of the methods of work or any other cause, or on grounds of inefficiency must be retained.

Therefore, apart from curtailing or limiting the power of the Crown to dismiss without notice, the rules referred to acknowledge and retain that power for the effective administration of the railway. We therefore think that the plaintiff has failed to establish his claim to damages and his appeal must therefore be dismissed with costs. No order on cross-objections. Civil Application No. 1018 of 1933 is dismissed with costs.

K.B./R.K. *Appeal dismissed.*

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[6] Dunn v. Queen, (1896) 1 Q B 116=65 L J Q B 279=73 L T 695=44 W R 243=60 J P 117.

[7] Shenton v. Smith, (1895) A C 229=64 L J P C 119=11 R 375=72 L T 130=43 W R 637.

[8] Grant v. Secy. of State, (1877) 2 C P D 445=46 L J C P 681=37 L T 188=25 W R 848.

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BEAUMONT, C. J.

Mahabaleshwar Venkatraman Hegde Makki — Defendant No. 1 — Appellant.

v.

Krishna Ganapati Hegde and *others* — Plaintiffs — Respondents.

Second Appeal No. 24 of 1934, Decided on 15th April 1937, from decision of Dist. Judge, Kanara at Karwar, in Appeal No. 84 of 1931.

Hindu Law—Widow—Rights of — Widow of Dekkhan agriculturist usufructuary mortgagor selling equity of redemption—Death of widow — Reversioners setting aside alienation and suing for redemption claiming under S. 13, Agriculturists' Relief Act, account of profits from commencement of mortgage—Reversioners held not entitled to account of profits for period covering widow's life time—No difference made by Dekkhan Agriculturists' Relief Act.

A Hindu widow during her lifetime is entitled to the profits of her husband's immoveable property and any alienation by her is good until challenged by the reversioners and in any case is good for the period of her lifetime. [P 453 C 2; P 454 C 1]

A Dekkhan agriculturist, owner of equity of redemption in a usufructuary mortgage, died leaving a widow who became entitled to a widow's estate in her husband's property. She sold the equity of redemption to a person who in his turn sold it to the mortgagee. After the death of widow her husband's reversioners got a decree setting aside the alienation and subsequently sued for redemption claiming, under S. 13, Dekkhan Agriculturists' Relief Act, account of the profits from the commencement of the mortgage:

Held: that as the reversioners did not derive any title from the widow, they were not entitled to the account of profits for the period of the widow's lifetime and the Dekkhan Agriculturists' Relief Act did not make any difference at all. [P 454 C 1]

R. A. Jahagirdar — for Appellant.

G. P. Murdeshwar — for Respondents 1 and 2.

Judgment.—This is a second appeal from a decision of the District Judge of Karwar. I am told there is no authority on the point raised, but it seems to me a point which presents no difficulty at all, and depends upon appreciation of the rights of a widow under Hindu law. The suit is a suit to redeem a mortgage made in 1901. The equity of redemption in that mortgage became vested in Subraya, who died in 1905, leaving a widow Bommi, who became entitled to a widow's estate in her husband's property. That gave her the right during her lifetime to receive the income of the property, or to deal with it as she chose, whether by sale or gift. In 1907 Bommi sold her rights in her husband's property which included the equity of redemption in the mortgaged property to one Subba and in 1910 Subba sold the equity to the son of the mortgagee. I understand that the mortgagee was then dead, and that in fact the mortgagee's son became entitled to the whole of the mortgaged property, i. e. the mortgage and the equity. In 1916 the plaintiffs, who were reversioners of Subraya's property subject to the interest of his widow, brought a suit for a declaration that the alienation by Bommi was not binding on them, and that declaration was made. In 1925 the mortgagee assigned his interest to defendant 1, and in 1929 Bommi died. Soon after that, the plaintiffs brought a suit for redemption of the mortgage, and as it has been declared that Bommi's alienation of the equity of redemption does not bind the reversioners, the plaintiffs are entitled to a decree for redemption.

The only question is whether they are entitled to an account of the profits of the land which accrued during Bommi's lifetime. The mortgage, I understand, was a usufructuary mortgage, and the mortgagee was entitled to take the profits as against interest. But the plaintiffs being agriculturists, under S. 13, Dekkhan Agriculturists' Relief Act the accounts can be opened from the commencement, and the mortgagee will have to account for profits over and above interest at the rate allowed by the Court. The learned trial Judge held that the mortgagee was not bound to account for any profits between the date of the sale by Bommi in 1907 and her death in 1929. I think myself that the period should have been from the death of Bommi's husband in 1905, and not from the sale in 1907, but there is no cross-objection as to that. In my opinion apart from that point, the decision of the trial Court is clearly right. But in appeal the learned District Judge reversed that decision, and directed the mortgagee to account for the mesne profits from the commencement. I confess that I am quite unable to follow the reasoning of the learned District Judge, which seems to me to be based on a misunderstanding of the rights of a Hindu widow. A Hindu widow during her lifetime is entitled to the profits of her husband's immoveable property, and any alienation by her is good until challenged by the reversioners, and in any case is good for the period of her lifetime. If Bommi had not alienated the equity of redemption, I apprehend, that an account of the profits which accrued during her lifetime could not have been claimed by the plaintiffs; such an account could only have been claimed by her, or after her death by her representatives. The plaintiffs could only have claimed such an account by making a title from Bommi, for example by proving that she had so dealt with the profits as to show an intention to add them as an accretion to the corpus. In the events which happened, Bommi sold the equity in 1907, and from 1910 the mortgagee acquired the equity and would be accountable to himself. Before 1910 there might be a liability to account to Bommi, or the purchaser from her, but not to the plaintiffs, who do not claim through her. The learned District Judge seems to have thought that the Dekkhan Agriculturists' Relief Act makes a difference. In my opinion it makes no difference at all. Apart from that Act the mortgagee would not be liable to account at all for the profits. Under that Act he is liable to account but only to the persons entitled to the profits, and the present plaintiffs are not entitled to such profits. In my opinion the judgment of the District Judge was wrong and must be set aside and the decree of the trial Court restored. Costs of the appeal and of the lower Appellate Court to be paid by the plaintiffs.

D.S./R.K. *Decree set aside.*

A. I. R. 1937 Bombay 454

BROOMFIELD AND N. J. WADIA, JJ.

Zinabhai Bhimbhai — Applicant.

v.

Bai Mani — Opponent.

Criminal Revn. Appln. No. 28 of 1937, Decided on 30th March 1937, against order of First Class Magistrate, Bulsar.

Criminal P. C. (1898), S. 489—Court is not fettered by technical rules as to representation on behalf of wife—Court may require any person to state case on behalf of wife if circumstances require.

In accordance with the maxim *audi alteram partem*, the Court may properly require that the point of view of the wife or child as the case may be should be properly placed before it in the case of an application under S. 489, Criminal P. C., for reduction of the amount of maintenance. But the Court is not fettered by any technical rules as to representation or as to the kind of evidence which it may accept as sufficient. There is no need for the appointment of a guardian ad litem. [P 455 C 2]

A person applied under S. 489, Criminal P. C., for reduction of the amount of maintenance which he was paying to his wife previously. As the wife was found of unsound mind, the proceedings were stayed. In the meanwhile, the brother of the wife applied for his appointment as the manager of her estate with a view to recover the amount of maintenance awarded to her. After his appointment under S. 71, Lunacy Act, the husband renewed his application under S. 489, Criminal P. C., against his wife as represented by her brother guardian :

Held : that the application could be proceeded with as the brother who had mainly applied for guardianship for recovering the maintenance amount was the proper person to state a case on behalf of the lunatic wife : *A I R 1925 Mad 440, Disting.* [P 455 C 2]

R. G. Naik — for Applicant.

U. L. Shah — for Opponent.

Broomfield, J.—This is an application for revision of an order by the First Class Magistrate, Bulsar, rejecting the petitioner's application under S. 489, Criminal P. C., for an alteration of the amount of maintenance which the petitioner has been ordered to pay to his wife. The original order for payment of maintenance of Rs. 19 a month to the petitioner's wife, Bai Mani, was made in January 1925. The allowance was duly paid for ten years. Thereafter the petitioner's circumstances changed, as he alleges, and he applied under S. 489 for a reduction of the amount of maintenance. At that time it was found that Bai Mani was of unsound mind. The proceedings were kept pending while an inquiry was made into the state of her mind. Ultimately her brother made an application to the District Judge under the Lunacy Act and was appointed manager of her estate under S. 71 of that Act. The application made by him shows that his object in applying was inter alia to enable him to recover the amount of maintenance payable to Bai Mani under the Magistrate's order. After the appointment of the manager for Bai Mani's estate, the petitioner renewed his application under S. 489. He described it as an application against Bai Mani represented by her guardian. The Magistrate took the view that as these proceedings under Ch. 36, Criminal P. C. are criminal proceedings or proceedings of a criminal nature, the Court has no power to appoint a guardian ad litem and a guardian or manager appointed under S. 71, Lunacy Act, is not entitled to speak on the lunatic wife's behalf. He accordingly held that he had no alternative but to reject the application. The learned Magistrate's decision has been supported before us on the following grounds. It is conceded that proceedings under Ch. 36 are not strictly speaking criminal. Nevertheless, the procedure is as laid down in the Criminal Procedure Code and not as laid down in the Civil Procedure Code and there is no provision for hearing any party by his or her guardian. If it were a civil proceeding under O. 32, R. 3, the Court would have to appoint a guardian ad litem in spite of the fact that a guardian or manager may have been appointed for a lunatic party under the Lunacy Act. But under the Criminal Procedure Code there is no provision for appointing a guardian ad litem.

Reliance has been placed upon 48 Mad 388.[1] That was a case where an application for maintenance had been made against a husband under S. 488 and the husband was found to be of unsound mind. The Court held that by analogy the provisions of Ch. 34, Criminal P. C., in particular S. 464, ought to be applied and the proceedings stayed indefinitely until such time as the lunatic husband was capable of understanding the proceedings. But, in our opinion, an application under S. 488 for maintenance against a husband or father stands on a different footing altogether from an application under S. 489 by the person who has been ordered to pay maintenance. Cl. (6) of S. 488 provides that all evidence shall be taken in the presence of the husband or father, as the case may be, or when his personal attendance is dispensed with, in the presence of his pleader. As pointed out in 48 Mad 388,[1] the result of proceedings under the Chapter may possibly be that an order of imprisonment may be made against a person disobeying the order. It is easy to understand therefore that where the husband or father becomes incapable of understanding the proceedings, there may be no alternative but to stay those proceedings until he recovers his sanity. But the same considerations do not apply where it is the person in whose favour an order has been made who becomes insane. It is nowhere provided that the person claiming to be entitled to maintenance should necessarily be heard in person. There is no provision in S. 489 requiring the issue of a notice to the wife or child. Under S. 488 it may be ordered that the maintenance should be paid to such person as the Magistrate from time to time directs. S. 490 provides that a copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid. These may be said to be indications that the guardian of a minor child or of a lunatic wife for instance may be recognized as in a sense a party to the proceedings under this Chapter.

No doubt in accordance with the maxim *audi alteram partem*, the Court may properly require that the point of view of the wife or child, as the case may be, should be properly placed before it in the case of an application under S. 489 for reduction of the amount of maintenance. But the Court is not fettered by any technical rules as to representation or as to the kind of evidence which it may accept as sufficient. There is no need for the appointment of a guardian ad litem. S. 75 of Act 4 of 1912 provides that every manager of the estate of a lunatic may collect and pay all just claims, debts and liabilities due to or by the estate of the lunatic. As I have said, the application was made by the wife's brother to the District Court mainly for the purpose of collecting the amount of maintenance made payable by the husband. Under the circumstances the manager appointed by the District Judge is obviously the proper person to state the case for the wife. There is nothing in the Code which prevents the Magistrate from taking his evidence. Nor is there anything in the Code which requires that any additional or different evidence should be produced or that the wife should be otherwise represented. We think the Magistrate took too narrow a view of his powers under Ch. 36 in holding that he could not proceed with this application. We therefore make the Rule absolute, set aside the order rejecting the application and direct that it be proceeded with according to law.

K.B./R.K. *Rule made absolute.*

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[1] Appichi Goundan v. Kuthujammal, A I R 1925 Mad 440=86 I C 77=26 Cr L J 701=48 Mad 388=48 M L J 187.

A. I. R. 1937 Bombay 456

BEAUMONT, C. J. AND N. J. WADIA, J.

Secretary of State — Defendant — Appellant.

v.

Ganesh Narayan Gadgil — Plaintiff — Respondent.

Second Appeal No. 33 of 1933, Decided on 25th February 1937, from decision of Dist. Judge, Thana, in Appeal No. 159 of 1931.

Bombay Land Revenue Code (5 of 1879), S. 66—User of agricultural land for non-agricultural purposes — Occupant is liable under S. 66 to fine even if such user is made by trespasser.

The words "so used" in S. 66, Bombay Land Revenue Code, do not import user by any particular class of persons such as those mentioned in S. 65. [P 456 2]

An occupant of agricultural land is liable to fine under S. 66 of the Act if there is any user of his land for non-agricultural purposes irrespective of whether the conversion has been made by the occupant or his tenants or agents or by some trespasser without the occupant's knowledge or consent. [P 456 C 2; P 457 C 2]

B. G. Rao — for Appellant.

G. B. Chitale — for Respondent.

Beaumont, C. J.—This is a second appeal from a decision of the District Judge of Thana, which raises a short point of law under the Bombay Land Revenue Code of 1879. The present respondent is the occupant of certain land assessed for agricultural purposes. A trespasser entered upon the land without the knowledge or consent of the occupant, and quarried stones from the land, that is to say, he used the land for a non-agricultural purpose; and the question is whether such user by a trespasser subjects the occupant to liability to a fine under S. 66, Bombay Land Revenue Code. S. 65 of the Code provides that an occupant of land assessed or held for the purpose of agriculture is entitled by himself, his servants, tenants, agents, or other legal representatives to make certain improvements. Then it provides that if any occupant wishes to use his holding or any part thereof for any other purpose, the Collector's permission shall be applied for. Then provision is made as to how the Collector's permission is to be given, and the last paragraph provides that when any such land is thus permitted to be used for any purpose unconnected with agriculture, it shall be lawful for the Collector to require the payment of a fine in addition to any new assessment. Then comes S. 66, which provides:

> If any such land [which, referring back to S. 64, means 'any land assessed or held for the purpose of agriculture'] be so used [which again referring back to S. 65, means 'used for any purpose unconnected with agriculture'] without the permission of the Collector being first obtained, or before the expiry of the period prescribed by S. 65, the occupant and any tenant or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so used and from the entire field or survey number of which it may form a part, and the occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of S. 48 for the period during which the said land has been so used, such fine as the Collector may, subject to the general orders of Government, direct.

Then there is a provision that:

> Any tenant or any occupant or any other person holding under or through an occupant, who shall without the occupant's consent use any such land for any such purpose, and thereby render the said occupant liable to the penalties aforesaid, shall be responsible to the said occupant in damages.

The trial Judge held that the use of the land for non-agricultural purposes by a trespasser subjected the occupant to a fine under S. 66; but the District Judge differed from that opinion and held that S. 66 was confined to user of the land by the occupant or any of the persons referred to in para. 1 of S. 65, i. e. servants, tenants, agents or other legal representatives. The learned District Judge extracted that meaning from the words "so used." But I am quite unable to agree with him that the words "so used" import user by any particular class of persons. The Act does not say "so used by the persons mentioned in S. 65." It is no doubt true that under S. 66 the Collector has a right of eviction only against an occupant and any tenant or other person holding under or through him. The right of eviction does not apply to a trespasser. Of course a trespasser can always be evicted by the true owner, and it may be that the Legislature thought it unnecessary to provide expressly for the eviction of a trespasser; but when one comes to the words imposing liability to a fine, they provide quite generally that an occupant shall be liable to fine. In my opinion the words of the section are quite clear, and an occupant is liable to fine if there is any user of his land for purposes other than agriculture, whether or not the occupant has consented to or has knowledge of such user. Mr. Chitale has also contended that the amount of the fine is in excess of that leviable under Rr. 100 to 102 of the Land Revenue Rules, but that point was not taken in either of the Courts below, and if it had been, Government might have given evidence as to the circumstances which justified the imposition of the fine in question under R. 102. In my opinion therefore we cannot allow any question to be raised as to the amount of the fine. The appeal must be allowed with costs throughout.

N. J. Wadia, J.—Section 48, Bombay Land Revenue Code, provides for the levy of altered assessment when land held for agricultural purposes is converted to a non-agricultural purpose, and the section makes no distinction between conversion of the land by the occupant or persons holding through or under him, or by trespassers without the knowledge or permission of the occupant. S. 65 lays down the procedure to be followed by an occupant if he wishes to convert his land from an agricultural purpose to a non-agricultural purpose, and S. 66 provides for the penalties to which an occupant renders himself liable if land is unauthorizedly converted from an agricultural to a non-agricultural purpose. The latter section provides that when agricultural land is so used, i. e. for a purpose unconnected with agriculture, without the previous permission of the Collector being obtained, the occupant is liable to pay altered assessment and fine. There is nothing in the language of the section which justifies the view which the learned District Judge has taken that the liability to altered assessment and fine is incurred by the occupant only when the conversion is by himself or by a tenant or agent of his. To put such a restriction on the words of the section would defeat one of the principal objects of S. 48, since it would permit a conversion of land from agricultural to non-agricultural uses without giving Government the right to check such conversion by the levy of altered assessment and fine. Although the appeal to the District Court was against the levy of both altered assessment and fine in this case, Mr. Chitale in the course of his argument conceded that Government were entitled to levy altered assessment from the occupant even though the conversion to non-agricultural purposes might have been made by a trespasser without the knowledge or consent of the occupant. The section, however, makes no distinction between the right to levy altered assessment and the right to levy fine. Both follow upon the conversion of the land from one use to another irrespective of whether the conversion has been made by the occupant or his tenants or agents or by somebody without the occupant's consent. I agree therefore that the view taken by the District Judge is wrong, and that the appeal must be allowed.

K.B./R.K. *Appeal allowed.*

✲ A. I. R. 1937 Bombay 457

BEAUMONT, C. J.

Karimunnisa Begum — Applicant.

v.

Kaji Mir Jamaluddin Valade Mir Masum Alikhan and *others* — Opponents.

Civil Revn. Appln. No. 61 of 1936, Decided on 7th April 1937, against order of Extra Joint Second Class Sub-Judge, Surat.

✲ Civil P. C. (1908), S. 152 — Consent order—Clerical or mathematical mistake can be corrected under S. 152.

A consent order is a form of contract. A mistake in a contract, common to both parties—and a clerical or mathematical error can hardly fail to be that—can be rectified by an order of the Court; the method of obtaining such an order is a matter of procedure ; normally a suit is necessary, but when the contract is embodied in an order, there is no reason why the parties should not avail themselves of the simple method of correcting such mistakes in an order provided by S. 152, Civil P. C. [P 457 C 2; P 458 C 1]

H. M. Choksi — for Applicant.

Order. — In this case a consent order was made, and it is alleged that that order contains a clerical or arithmetical mistake, and an application was made to the learned Judge under S. 152, Civil P. C., asking him to correct the mistake. The learned Judge refused to entertain the application on the ground that S. 152 does not apply to a consent order. I have been referred to no authority, and I know of none, in this country or in England, which deals with this particular point, and I must decide it on principle. A consent order is a form of contract; a mistake in a contract common to both parties—and a clerical or mathematical error can hardly fail to be that—can be rectified by an order of the Court; the method of obtaining such an order is a matter of procedure. Normally a suit is necessary, but when the contract is embodied in an order, I see no reason why the parties should not avail themselves of the simple method of correcting such mistakes in an order provided by S. 152. In my opinion therefore the Judge had power to entertain the application. I must set aside the order of the lower Court and send the case back to the learned Judge with a direction to deal with it on the merits and decide whether the case does or does not fall within the terms of S. 152. If it does, I think he can make the alteration required without putting the parties to the delay and expense of filing a suit. The costs of this revisional application will be costs in the application to be dealt with by the Judge.

B.D./R.K. *Case remanded.*

A. I. R. 1937 Bombay 458

BARLEE AND DIVATIA, JJ.

Madivalappa Irappa and *others* — Defendants — Appellants.

v.

Subbappa Shankreppa Nadagauda and *another* — Plaintiffs — Respondents.

First Appeal No. 322 of 1931, Decided on 9th March 1937, from decision of First Class Sub-Judge, Bijapur, in C. S. No. 415 of 1929.

(a) Decree—Validity of—Decree is binding on parties unless set aside or shown to be void—Decree cannot be declared void merely because it is based on wrong principles.

A decree is an adjudication of a Civil Court and is binding on the judgment-debtor and all those claiming from or through that judgment-debtor until it has been set aside, or shown to be void. A decree is void if the Court had no jurisdiction to pass it, or if it is passed against a dead person, or against a person who has never had an opportunity of appearing. It is voidable if it is obtained by fraud or collusion. A decree cannot be declared void merely because it is based on wrong principles. Such a decree can be corrected by a Court of Appeal, but once the opportunity for appeal is past, it is as binding as a decree which is passed on the most clear and correct principles of law. [P 459 C 2]

(b) Hindu Law — Widow — Suit against widow on transaction entered into by her husband—Decree passed in such suit is one as representing husband's estate and binding on reversioner — Reversioner cannot challenge it on ground of voidability of transaction.

In a suit against a Hindu widow in respect of a transaction which has been entered into by her husband, she represents the estate of her husband, and a decree passed against her would bind her as well as the reversioners. A reversioner cannot challenge such decree on the ground that the contract of her husband on which the claim was based was not binding on the estate because it was void for any reason: *10 Cal 985* (*P C*) and *9 M I A 539* (*P C*), *Expl.* [P 460 C 2]

(c) Hindu Law — Succession — Mitakshara School—Two or more sons succeeding to father's separate property take as joint tenants—Transfer by one of them as manager is good.

According to the Mitakshara School of Hindu law, two or more sons, grandsons and great grandsons succeeding as heirs to the separate or self-acquired property of their paternal ancestor take as joint-tenants with rights of survivorship and a transfer by one of the members as the manager of the family would be good even without the other members being joined as necessary parties. [P 461 C 2]

(d) Hindu Law—Widow—Adverse possession—Reversioner.

Adverse possession against a widow is not adverse possession against the reversioner. [P 461 C 2]

G. N. Thakor and *H. B. Gumaste* — for Appellants.

F. B. Tyabji and *R. A. Jahagirdar* — for Respondent 1.

Facts.—One Dodappa died in 1878 leaving three widows behind him, the eldest of them being Malkama. In 1880 Malkama adopted a boy called Sangaraddi who became the owner of Dodappa's estate. In 1892 Sangaraddi executed a bond for Rs. 3,000 in favour of one Hanmant. In 1895 Sangaraddi died without any issue and his widow Baslingama succeeded to his property. Subsequently the legal representative of Hanmant obtained a decree against the widow Baslingama on the money-bond executed by her husband and sold the property in suit in execution of that decree. The property was purchased by the predecessors-in-title of Madivalappa and others. In 1903 Baslingama died issueless and upon her death Sangaraddi's adoptive mother succeeded to the estate. Subsequently one Kalyanappa who was the nearest reversioner succeeded to the property after the death of Malkama. Kalyanappa died in 1922 leaving two sons and two grandsons by a predeceased son, and they formed a joint family. Kalyanappa's eldest son Ayappa sold in his capacity as the manager of the family the suit property to one Subappa on 24th August 1929. Subappa thereupon demanded possession from the auction purchasers who were in actual possession thereof. On their refusing to deliver possession he filed a suit against them for declaration of his title to the suit property and to recover possession of the same with mesne profits. Ayappa was joined as plaintiff 2 in the suit.

Barlee, J.—(After stating the facts, his Lordship proceeded.) Mr. G. N. Thakor who has argued this appeal on behalf of the defendants has challenged the findings of fact that Sangaraddi was a minor at the date of the bond in 1892, and that he died in 1895. It is not necessary to deal with this portion of the case in detail, inasmuch as we think it is clearly shown by the evidence on the record that Sangaraddi must have been a minor in 1892. That evidence includes a statement made by Malkama, the adoptive mother, when she applied for guardianship, a statement made by his natural father in 1883, and three entries from a school register. Very naturally, there is a good deal of discrepancy between the results of these papers, but putting the case for the defence at its highest, Sangaraddi cannot have been more than 18 in the year 1892. The learned counsel has commented on the failure of the plaintiffs to procure a copy of the birth certificate of the boy, and their excuse that his name could not be found in the records in the village birth and death register between the years 1871 and 1876, or thereabouts, was obviously not a very convincing one. But we think that the plaintiffs certainly have made out a very strong case, prima facie, even though they have not proved it to the hilt, and if the village register could have given any other better information the defendants might have produced it. It is also clear from the statement made in the suit register, to which I have alluded, Ex. 126, that the suit was filed against Baslingamma as the widow of Sangaraddi, the deceased, and in fact it was never denied in the lower Court that Sangaraddi was dead at the date of the suit, though that fact was specifically pleaded.

The other point of fact with which I would shortly deal before turning to the law are the findings of the learned Judge that there was no consideration for the bond, and secondly that there was no necessity for the bond. We entirely agree with Mr. Thakor that these findings can justly be termed fanciful. The only ground for the view that there was no consideration for the bond was that in the same year, or in or about the same year, Malkama herself executed a bond for Rs. 3,000. That seems to us at the most to justify suspicion, but it is not a fact which can be looked upon as evidence of failure of consideration, and the main reason, which the learned Judge has given for holding that there could have been no necessity for the bond is still weaker, that the boy could not have needed this sum as he had a large income from his property. Many owners of properties are in need of money.

I come now to the decision of the learned Judge that the bond was a nullity, and that therefore the decree may be ignored by the reversioners. A decree is an adjudication of a Civil Court and is binding on the judgment-debtor and all those claiming from or through that judgment-debtor until it has been set aside, or shown to be void. A decree is void if the Court had no jurisdiction to pass it, or if it is passed against a dead person, or against a person who has never had an opportunity of appearing. It is voidable if it is obtained by fraud or collusion—*see* S. 44, Evidence Act. With all respect to the learned Judge, we have never heard of a decree being declared void because it was based on wrong principles. Such a decree can be corrected by a Court of Appeal, but once the opportunity for appeal is past, it is as binding as a decree which is passed on the most clear and correct principles of law. I need not therefore refer to the learned Judge's discussion of this point, but will take up the more scientific argument put forward by Mr. Tyabji. His argument is based on S. 199, at p. 215 of Sir Dinshaw Mulla's Hindu Law, Edn. 8. The passage runs thus:

> A widow or other limited heir represents the whole estate in legal proceedings relating thereto. Therefore, a decree passed against her and a sale of the estate in execution of such decree is binding not only on her, but on the reversioners, even though they were not parties to the suit, provided—(1) the suit was in respect of a debt or other transaction binding on the estate, and (2) the decree was passed against her as representing the estate, and not in her personal capacity, 'unless', as laid down by their Lordships of the Privy Council in the *Shivagunga case*, 9 M I A 539,[1] 'it could be shown that there had not been a fair trial of the right in that suit'.

It is conceded by the learned counsel that in a suit against a minor widow in respect of a transaction which has been entered into by her husband, she represents the estate of her husband, and that the decree against her would bind his reversioners if the other conditions are satisfied. But his case is that the other conditions are not satisfied inasmuch as this suit was in respect of a debt, which was not in law binding on her husband's estate.

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[1] Kattama Nauchear v. Raja of Shivagunga, (1865) 9 M I A 539=2 W R 31 (P C).

If this first Proviso in S. 199 were a correct statement of the law, the case for the plaintiffs would no doubt be very strong. But we have referred to the anthorities which the learned author cites for this proposition and we cannot find any justification for it. We can find no authority for the words "binding on the estate" in the passage which I have quoted. The authorities cited are the Privy Council decisions in 10 Cal 985[2] and the *Shivagunga case.*[1] In the former, we find the following passage (p. 991):

> It was held in the *Shivagunga case*,[1] that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against the widow in respect of the estate the decision is binding upon the reversionary heir.

And later on (p. 991):

> .... there are many cases in which when the right, title and interest of the widow is sold the whole interest in the estate passes. In other cases the whole interest does not pass. The case depends upon the nature of the suit in which the execution issues. There are many authorities to that effect ... If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes.

The other case, *Kattama Nauchear* v. *Raja of Shivagunga*, is reported in 9 M I A 539,[1] and the passages we were referred to are at pp. 601, 603 and 604. At the bottom of p. 603 we find this paragraph:

> It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound those claiming the zamindary in succession to her. And their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the zamindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants-in-tail, representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

These are the principal cases on which the learned author has relied for his statement of the law in para. 199 and there is nothing in them to suggest that a reversioner can challenge a decree against a Hindu widow as representing the estate of her husband on the ground that the contract of her husband on which the claim was based was not binding on the estate because it was void, for any reason. I would add that if this be the legitimate extension of the rule laid down by their Lordships of the Privy Council, it would have justified the reversioners in claiming that they were not bound by a decrce which had been obtained against the husband himself. But, in our opinion, it is not a legitimate extension. It is a fundamental rule of procedure that where a decree has been made in a fair trial by a Court which has jurisdiction, it binds the judgment-debtor and every one who claims under him until set aside by a Court of Appeal. Neither the judgment-debtor nor his successors can ignore it, whether it be right or wrong, for, in the words of the Privy Council, a Court has jurisdiction to decide right or wrong. The so-called exception is no exception at all, for a decree against a Hindu widow arising out of a claim against her personally in respect of her own act does not bind the reversioner, because he does not claim through her but binds her estate only which is a life-interest in her husband's estate plus the right to dispose of the estate in perpetuity for necessity. On the other hand a decree made against her for an act of her deceased husband binds the reversioner inasmuch as she represents her deceased husband. Thus we are unable to accept the lower Court's argument that the decree against her, a Hindu widow as representing the estate of her husband, can be ignored by the reversioner.

The next question is whether it has been shown that this decree was not fairly obtained. The learned counsel has contended that it was for the defendants to show that it had been fairly obtained, but we cannot accept this view. The defendants are the auction purchasers, who can be expected to have no knowledge of the facts of the suit in which the decree was obtained, and in any case it was for the plaintiffs to show reasons why a decree, which apparently is in order, should not bind them. The arguments which found favour with the learned Subordinate Judge for his finding that the decree has not been fairly obtained do not appear to us to have much weight. He has held that the decree was passed ex parte and that the defendant Sangaraddi's widow was not represented properly. Neither of these reasons appears to be justified by the record. The only document we have in connection with this suit is Ex. 126, to which I have already alluded. It is a suit register, and it shows that the minor widow was represented by her father, and that he briefed a pleader, who put in an appearance. Technically then it was not an ex parte decree. The learned Subordinate Judge has laid stress on the fact that only one-fourth of the costs were allowed as showing that the decree was passed ex parte. But that order appears to be mistaken. It may be conceded that the suit was not defended, but that is not a reason for saying that the trial was not fair.

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[2] Jugul Kishore v. Jotendra Mohun Tagore, (1884) 10 Cal 985=11 I A 66=4 Sar 553 (P C).

The other point also lacks substance. Malkama, as guardian of her son Sangaraddi, would have been the proper guardian ad litem for him had he been alive, but on her death her guardianship ceased, and we cannot say that the girl's father with whom she was living was not the proper person to be appointed. In fact we are not convinced that there is anything unfair about this decree. The learned counsel has suggested that the defence was grossly negligent inasmuch as the guardian neglected to urge that the bond on which the suit was based was a nullity, or that there had been no consideration, but it is impossible at this stage for us to say that the defence would have been successful. At that date, in 1897, the view held by this Court was that a contract by a minor was voidable and not void and could be sued on if the loan had been for a necessary purpose. Thus, without knowing what the object of the loan was, we are unable to criticise the action of the defendant or her legal adviser. As I have said we are not convinced by the argument that there was no consideration at all. In fact the absence of that defence to this suit must point to the fact that there must have been some consideration. The decision of these issues is sufficient to dispose of this case.

Mr. Thakor on behalf of the appellants has argued that the plaintiffs had no title to sue alone. The property had come to Kalyanappa as separate property, and on his death went by inheritance to his sons, Ayappa and Doddappa, and learned counsel has argued that both should have been joined in the sale to plaintiff 1 and both should have been joined in the suit. But Mr. Tyabji has referred us to S. 31 of Sir Dinshaw Mulla's work, where it is stated:

> According to the Mitakshara school, two or more persons inheriting jointly take as tenants-in-common except the following four classes of heirs who take as joint tenants with rights of survivorship: (a) Two or more sons, grandsons and great grandsons succeeding as heirs to the separate or self-acquired property of their paternal ancestor.

It would follow from this that the property was joint family property in the hands of Ayappa and Doddappa and therefore the sale by Ayappa, who was the manager, was good, and no other member of the family was a necessary party. Mr. Thakor's argument on the point of limitation is that the Article applicable was 144 and not 141. This argument is based on the assumption that the decree was passed against Sangaraddi himself, and not against his widow. As however he died before the decree and before the defendants obtained possession, their possession was adverse to the widow, and according to the rulings of this Court, adverse possession against a widow is not adverse possession against the reversioner: *see* Mulla's Hindu Law, S. 201 at p. 218. This point however is now academic. But as we differ from the learned Judge on the main issue, we must set aside his decree. The result is that the appeal is allowed and the suit is dismissed with costs throughout.

Divatia, J.—I agree.

K.B./R.K. *Appeal allowed.*

✻ A. I. R. 1937 Bombay 461

BARLEE AND TYABJI, JJ.

Chunilal Raichand — Applicant.

v.

Broach Urban Co-operative Bank, Ltd. — Opponents.

Civil Revn. Appln. No. 388 of 1936, Decided on 25th February 1937, against order of Dist. Judge, Broach and Panch Mahals, in C. A. No. 21 of 1936.

✲ Civil P. C. (1908), S. 73—'Same judgment-debtor' — Decree against judgment-debtor and later decree against his legal representative — Both decrees cannot be said to be against same judgment-debtor.

The Courts have no jurisdiction to expand the provisions of S. 73, Civil P. C. S. 73 provides for one particular case in order to entitle the decree-holders to apply for rateable distribution and that is that the decrees must be against the same judgment debtor. [P 462 C 2 ; P 463 C 2]

Where therefore the earlier decree is against a certain person and the later decree is against his legal representative on such persons' death, the two decrees cannot be said to be against the same judgment-debtor within the meaning of S. 73 of the Code, notwithstanding the fact that both the decrees are ultimately founded on a liability resting upon the deceased : *25 Bom 494, Foll.*; *A I R 1936 Mad 40 (F B), Dissented.* [P 463 C 1]

B. G. Thakor — for Applicant.

H. D. Thakor — for Opponent (No. 4).

Barlee, J. — The question which we have to decide is whether we should refer this case to a Full Bench for reconsideration of the ruling of this Court in 25 Bom 494,[1] in view of the subsequent decision of a Full Bench of the Madras High Court in 59 Mad 93.[2] The question concerns the interpretation of S. 73, Civil P. C., which provides for rateable distribution amongst decree-holders of assets held by a Court. Such assets have to be rateably distributed amongst such persons as have applied to the Court for the execution of decrees passed against the same judgment-debtor. Now in 25 Bom 494[1] a decree had been obtained by Mohoniraj against one Bhau Babaji ; Bhau died shortly after and his son Kashinath was placed on the record as his legal representative ; meantime Govind Abaji obtained a decree against Kashinath as the legal representative of the estate of his father Bhau and applied under S. 295 (now S. 73) to share rateably in the proceeds. The trial Court rejected the application and Govind Abaji later came before this Court in revision, when Sir Lawrence Jenkins C. J. and Chandavarkar, J. decided that there was no case made out for a rateable distribution. The learned Chief Justice's judgment is very short. He says (page 496) :

> In my opinion no case is made for a rateable distribution under S. 295 . . . . It is useless to speculate as to any other test than that which the section itself provides, and that test is stated in the plainest terms. So far as the present case goes, it is enough to say that the money decrees must be against the same judgment-debtor. Here however one decree is against Bhau Babaji Jangam and the other is against his son Kashinath.

In the present case the petitioner obtained a decree against one Jorbhai and after his death defendant 4, the Broach Urban Co-operative Bank, obtained a decree against the widows of Jorbhai to recover money due to the bank by Jorbhai. Therefore the two decrees were not passed against the same judgment-debtor and the position is exactly the same as that in 25 Bom 494.[1] The Judges who decided the Madras Full Bench case were of opinion that the view taken in our Court was too narrow. Pandrang, Row, J. says (page 97):

> In neither of these two cases, 25 Bom 494[1] and 33 Mad 465,[3] was any reference made to the objects of S. 73, Civil P. C.

Later on he says (page 98) :

> In 27 C L J 100[4] the fact that both the decrees were capable of execution against the same estate was held to be a sufficient reason for concluding that the decrees may without unduly straining the language of S. 73, Civil P. C., be regarded as passed against the same judgment-debtor, ...

This view had been considered but discarded in our Court. Cornish, J. stated (page 100) :

> The notion underlying these principles is that the legal representative takes the place of the deceased and is under the obligation which lay upon the deceased of paying lawful claims against the deceased out of the deceased's assets.

This is no doubt correct, but hardly relevant. It explains why the Legislature should have provided for a case of this sort. But the fact remains that S. 295, Civil P. C., did not provide for a case of this nature. It provided for one case only where there are two or more decrees passed against the same judgment-debtor; and though after that decision, which was delivered in 1901, the Civil Procedure Code of 1882 was repealed and re-enacted and Sir Lawrence Jenkins himself was a member of the Special Committee on the Bill, the Legislature neglected to take the opportunity of changing the words of the section. In my opinion the Madras interpretation is not justified by the words of the section, and since the Legislature has not cared to amend it, we must accept it as it is unamended, and must follow the case in 25 Bom 494.[1] The Rule is therefore discharged with costs.

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[1] Govind Abaji v. Mohoniraj Vinayak, (1901) 25 Bom 494=3 Bom L R 407.

[2] Rama Krishnan Chettiar v. Kasi Vishwanathan Chettiar, A I R 1936 Mad 40 = 159 I C 501=59 Mad 93=69 M L J 711 (F B).

[3] Srinivasa Aiyangar v. Kanthimathi Ammal, (1910) 33 Mad 465=5 I C 917.

[4] Nilmoni v. Hiralal, A I R 1918 Cal 281 = 43 I C 452=27 C L J 100.

Tyabji, J.—I agree. We are invited to refer the question to a Full Bench on the ground that the decision in 25 Bom 494[1] requires to be reconsidered, especially in view of the decision in 59 Mad 93.[2] In 25 Bom 494[1] it was held that the rule laid down in S. 295, Civil P. C. of 1882 (which corresponds to S. 73 of the present Code) must be construed in accordance with the language of the Legislature. Sir Lawrence Jenkins observes : "It is useless to speculate as to any other test than that which the section istelf provides" ; and he goes on to say : "that test is stated in the plainest terms". The test provided by the section is that the decrees in execution of which the assets may be rateably distributed, must be decrees against the same judgment-debtor. Sir Lawrence Jenkins shortly states that the judgment-debtor cannot be said to be the same when the earlier decree is against the deceased and the second decree is against the legal representative of the deceased—notwithstanding that both decrees are ultimately founded on a liability resting upon the deceased. Chandavarkar, J. who agreed with Sir Lawrence Jenkins, elaborates the reasoning. He refers in particular to the phraseology of the Code where the expression 'judgment-debtor' is defined, and to S. 234 corresponding to S. 50 of the present Code. He comes in the result to the same conclusion as Sir Lawrence Jenkins, viz. that a decree obtained against *A* must be construed as a decree against a different judgment-debtor from a decree obtained against the legal representatives of *A*.

The petitioner before us relies mainly upon the reasoning of the Full Bench case decided by the Madras High Court to which I have already referred. Shortly stated the reasoning comes to this that though S. 73 refers to 'the same judgment-debtor', yet the reason why the section is enacted and the object of the section apply not only to decrees against the same judgment-debtor, but to a wider class of decrees, viz. to all decrees capable of execution against the same estate ; and that on this ground although the wording of S. 73 provides that the decrees must be against 'the same judgment-debtor', the section must be construed as if it provided that decrees capable of execution against the same estate must result in the assets being rateably distributed amongst all the decree-holders. It seems to me that the Courts have no jurisdiction to expand in this manner a legislative provision such as S. 73. The section provides for one particular case. Another case (considered from what the Court conceives to be the object with which S. 73 is enacted) may stand on the same footing. But this is no ground for assuming jurisdiction to decide the other case, for which no provision has been made by the Legislature, as if it had been provided for by the Legislature. My learned brother has pointed out that one of the Judges taking part in the decision in 25 Bom 494[1] was Sir Lawrence Jenkins and that after the decision he sat on the Special Committee for revising the Civil Procedure Code ; and yet the Code was not altered so as to provide for such cases.

If once the Courts proceed on the basis that is suggested, we may be invited to proceed similarly on an infinite number of grounds. Every matter referred to in S. 73 may then be liable to be substituted by other matters which the Court may consider to stand on a similar footing. S. 73 may thus be expanded infinitely in all directions, by a process of the permutation and combination of conditions which it may be argued stand on principle on the same basis as the particular condition expressly referred to by the Legislature. But that is a power that the Courts cannot assume to themselves—for all the prayers and tears of the party who for the time being suffers from this limitation upon the functions and powers of the Court. It seems to me therefore that taking the law as it is laid down in S. 73 — and not the law as it might have been if the section had not restricted its terms in the manner in which it is restricted—no other decision could have been arrived at than that contained in 25 Bom 494,[1] and it is useless to speculate whether other circumstances are so similar to those mentioned in S. 73 that the Legislature ought to provide that a similar rule ought to govern the other circumstances. I agree therefore that we ought to follow 25 Bom 494[1] and that there is no reason why the case should be referred to a Full Bench.

A.L./R.K. *Rule discharged.*

A. I. R. 1937 Bombay 464

BEAUMONT, C. J.

Auraj Joharmal Marwadi and *another* — Defendants 1 and 2 — Appellants.

v.

Dalpat Supadu, Plaintiff and *another*— Respondents.

Second Appeal No. 827 of 1933, Decided on 9th April 1937, from decision of Dist. Judge, East Khandesh at Jalgaon, in Appeal No. 70 of 1932.

Minor — Decree against — Setting aside— Negligence of guardian—Decree cannot be challenged in independent suit in absence of fraud or collusion—Minor must do so in original suit.

In the absence of fraud or collusion, if a minor wishes to challenge a decree against him on the mere ground of negligence by his guardian, however gross that negligence may be, he must do so in the suit, by such means as the rules of procedure provide, and he cannot challenge the validity of the decree in an independent suit: *12 Cal 69*; *A I R 1916 All 324* and *A I R 1920 Lah 417*, *Rel. on*; *22 Cal 8*; *A I R 1932 All 293* (*F B*) and *In re Hoghton*; *Hoghton* v. *Fiddey*, (*1874*) *18 Eq 573*, *Dissent.* [P 465 C 1]

P. V. Kane — for Appellants.

K. H. Kelkar — for Respondent 1.

Judgment. — This is a second appeal from a decision of the District Judge of East Khandesh, and it raises a short point which is by no means free from difficulty. The plaintiff in the suit is suing to set aside a decree passed in 1927 against him on certain money bonds which had been passed by his mother. In that suit the mother was the guardian ad litem of the plaintiff in the present suit, who was a minor. She entered an appearance and engaged a pleader, but at the hearing of the suit, the pleader put in a purshis that he had got no instructions and therefore retired from the suit, and a decree was then passed against the property coming to the hands of the minor. That decree has not been challenged in review nor has an attempt been made to set it aside under O. 9, R. 13, Civil P. C., 1908. In 1929, the minor by his next friend started this suit for a declaration that the decree made in 1927 was not binding on him on the ground that the guardian ad litem was guilty of gross negligence in the conduct of his defence, and he asked for an injunction to restrain the decree-holders from executing the decree. He also asked for relief in respect of a mortgage bond executed by the mother, but in respect to that he failed, and there is no appeal on that point. The trial Court held that the money bonds executed by the mother were not passed for legal necessity, and that the minor was entitled to challenge the decree founded on those bonds, and that decision was upheld by the District Judge.

In second appeal, I am bound by the finding that these money bonds were not passed for legal necessity. The point, however, which arises on this appeal, is a pure question of law, i. e. whether a minor can challenge in an independent suit the validity of a decree passed against him on the ground of the negligence of his guardian ad litem. There is a good deal of authority upon the point in India, but it is conflicting. In 12 Cal 69,[1] 38 All 452[2] and 1 Lah 27,[3] it was held that the minor could not challenge a decree duly passed against him on the ground of negligence by the guardian, and that his only remedy would be by way of review if he could bring himself within the terms of O. 47, R. 1. On the other hand, in 22 Cal 8[4] and 54 All 646[5] it was held that in such a case the minor could challenge the decree in a substantive suit. In the latter case, which was the decision of a Full Bench, Sulaiman, J., as he then was, gave an exhaustive and, if I may say so, a very interesting and instructive judgment, in which he reviewed the whole matter. I agree with him that S. 11, Civil P. C., relating to res judicata cannot apply when the previous judgment which is alleged to have decided the matter is challenged in the suit. The Court, I think, in that case went largely on the ground that in England there is in a minor a substantive right to set aside a decree against him on the ground of negligence by the guardian. I am not satisfied myself that that is so.

There is no doubt one decision of Malins, V. C., (1874) 18 Eq 573,[6] in which the learned Vice-Chancellor seemed to think that such a right existed, but I have not been referred to any other case on the subject, and I never in my experience came across any case of that sort in England. A judgment may of course be challenged in an independent suit on the ground of fraud or collusion, and if it were held that the negligent conduct of the guardian ad litem showed collusion with the plaintiffs, that undoubtedly would be a ground on which the judgment could be set aside. But mere negligence by a guardian cannot by itself be any evidence of fraud or collusion against the plaintiffs, who may very probably have no means whatever of ascertaining on what grounds the guardian acted. It seems to me in principle very dangerous to allow such a claim as this. A minor duly represented, as this minor was, by a guardian ad litem is bound by the order made just as effectively as an adult defendant would be, and to say that the decree against the minor can be set aside on the mere ground of negligence by the guardian for which the plaintiff is in no way responsible seems to me to open the door to a great deal of litigation. It might not be difficult for a minor on attaining majority to persuade his guardian ad litem, who is probably a relative, to admit negligence in the conduct of the minor's affairs in the suit. There appears to be no authority of this Court on the question, and I am not disposed to sanction anything in the nature of a fresh cause of action designed to re-open decrees legally passed. I myself prefer the view that in the absence of fraud or collusion, if a minor wishes to challenge a decree against him on the mere ground of negligence by his guardian, however gross that negligence may be, he must do so in the suit, by such means as the rules of procedure provide. In my opinion, therefore, the appeal must be allowed. No order as to costs.

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[1] Raghubar Dyal Sahu v. Bhikya Lal Misser, (1885) 12 Cal 69.

[2] Beni Prasad v. Lajja Ram, A I R 1916 All 324 =35 I C 63=38 All 452=14 A L J 438.

[3] Imam Din v. Puran Chand, A I R 1920 Lah 417=55 I C 833=1 Lah 27=84 P L R 1920.

[4] Lalla Sheo Churn Lal v. Ramnandan Dobey, (1894) 22 Cal 8.

[5] Siraj Fatma v. Mahmud Ali, A I R 1932 All 293=138 I C 465=54 All 646=1932 A L J 437 (F B).

[6] *In re* Hoghton; Hoghton v. Fiddey, (1874) 18 Eq 573=43 L J Ch 758=22 W R 854.

K.B./R.K. *Appeal allowed.*

A. I. R. 1937 Bombay 465

BEAUMONT, C. J. AND N. J. WADIA, J.

Ramsomappa Bhimrao Desai

v.

Secretary of State.

First Appeal No. 227 of 1931, Decided on 29th January 1937, from decision of First Class Sub-Judge, Bijapur, in C. S. No. 206 of 1929.

1937 B/59 & 60

(a) Bombay Rent-free Estates Act (11 of 1852), Sch. B. Cl. 6—Commissioner can only direct resumption by Government of claim to exemption from assessment—Government is not entitled to interfere with actual possession.

It is clear from the whole terms of the Act that what has to be considered are claims made to hold lands free from, or partially free from, assessment and all that the Commissioner can do under the Act is to direct resumption by Government of the claim to exemption from assessment. The Government have never considered that they were entitled under the Act to interfere with actual possession. Therefore all that the Government can deal with is the claim of certain persons to hold lands free from the ordinary obligation to contribute to Government revenues and not with actual possession of the soil : *1 B H C R 22* and *9 Bom 419, Foll.* [P 467 C 2 ; P 468 C 1]

(b) Grant— Inam — Resumption — Gordon grant stating that on payment of fixed sum every year in lieu of service, lands and allowances should be continued in lineal succession from generation to generation on condition that watandars should be obedient and faithful to Government — It further stated that lands and allowances should be continued without demanding more than fixed amount or without taking service so long as there are male heirs direct or indirect of the watan or there is any person adopted in watandar family—Watandar adopting daughter's son—Adoption by watandar without consent of Government or other members of family is good—Grant held not of soil but of right to hold land free from service and assessment—On breach of conditions Government could not resume possession of soil, it could only demand service or enhance assessment.

An adoption by a watandar without the consent of Government or of the other members of the family is good as between himself and the other members of the family : *27 Bom 75, Foll.* [P 469 C 2]

In 1845 one *V* claimed certain properties as desgat watan and applied that his name should be entered in Government records but he died in 1851 and after his death Government challenged the right of his minor son *B*. In 1852 the lands consisting of three villages were attached and an enquiry was instituted before the Inam Commissioner. In 1858 Inam Commissioner ordered that the villages should be at once resumed and assessed as khalsat, as he held that those villages did not beong to Desai watan but were jahagir lands. *B* preferred an appeal against this decision. The appeal was not decided but was compromised whereby Government made an offer to *B* in 1864 that if he agreed, summary settlement in respect of the properties pertaining to his watan would be applicable to him on certain conditions laid down by Government. *B* accepted these conditions and in 1872 a sanad was granted. The sanad was in the form known as Gordon sanad. The relevant portions of the sanad ran as follows :

"Persons who enjoy the said lands and cash allowances have agreed to pay to Government a fixed sum every year in lieu of service. Therefore it is (hereby) declared as follows: the said lands and cash allowances shall be continued in lineal succession from generation to generation by the British Government under the following conditions. Those conditions are: The said persons in enjoyment and their heirs shall be obedient to the British Government and act faithfully and honestly and shall go on paying to Government permanently, every year amounts as mentioned below. . . . So long as there are male heirs, i. e. direct or indirect of the watan or so long as there is any person adopted in the watandar family, the said lands and cash allowances shall be continued by Government without taking service and without demanding anything more than the abovementioned fixed amounts and without any objection or question as to the rights of the persons in enjoyment."

B had no son and he adopted his daughter's son *C*. On the death of *B* the Government resumed the possession of the land comprised in sanad on the ground that *C* was not lineal descendant of *B* and was not adopted from *B*'s family. In a suit brought by *C* for declaration that order of the Government was ultra vires and illegal:

Held: (1) that the only settlement arrived at between *B* and the Government was as to the right to hold the lands free from full assessment and the sanad had no reference to the right to occupy soil. If therefore either of the conditions of the grant, i. e. the condition of being faithful to Government and the condition of paying a fixed duty was broken, the grant would terminate and Government would be entitled to claim full assessment on the lands, but any right of occupation which the inamdar possessed apart from the sanad would remain untouched. None of the conditions of the sanad having been broken, Government could not resume the soil even if the sanad concerned the right to the soil. [P 468 C 2]

(2) that the words "in lineal succession from generation to generation" were not to be construed in their literal sense as meaning from father to son; they were equivalent to "continued to the owner and his heirs" because the conditions imposed were not upon lineal heirs but were imposed upon heirs generally. [P 468 C 2]

(3) that *C* being a validly adopted son of *B* was a lineal descendant of *B* and under Hindu Law had a status of a natural born son. [P 468 C 2; P 469 C 1]

(4) that the second clause of sanad was not a clause of re-entry, it merely provided that so long as there were the requisite heirs, the lands and cash allowances should be continued by Government without taking service or without demanding enhanced assessment, and even assuming that there were no male heirs of the watan and that no person adopted in the watandar family, the Government could not resume possession of the land but were only entitled to insist on service or further assessment. The orders of the Government resuming possession of the watan lands were therefore illegal and ultra vires. [P 469 C 1, 2]

A. G. Desai, *G. R. Madbhavi*, *K. G. Datar* and *G. A. Desai* — for Appellant.

P. B. Shingne (*Govt. Pleader*) and *N. M. Hungund* — for Respondents Nos. 1 and 2. respectively.

Beaumont, C. J.—This is an appeal by the plaintiff against a decision of the First Class Subordinate Judge of Bijapur. The plaintiff in the suit claims to be the watandar of certain immoveable properties described in Schedules A, B and C and of a cash allowance described in schedule D to the plaint, and he asks for a declaration that an order of Government of 16th August 1928, resuming possession of those properties was illegal and ultra vires, and for consequential relief. The question admittedly turns on the construction of a sanad granted by Government on 8th February 1872; but in order to construe that sanad it is necessary to know the circumstances which existed at the date when it was granted. The learned Judge in the Court below dealt with the history of the plaintiff's claim in much detail, and we have been referred to a large number of documents on the record. But in my opinion it is not necessary to discuss the earlier history of the plaintiff's claim in any detail. It is I think sufficient to say that in my opinion it is clearly established that the right of the plaintiff's family to act as desai in respect of these various lands was to some extent recognized by the Mahomedan Kings of Bijapur, afterwards by the Government of the Peshwas, and ultimately by the East India Company. The ancestors of the plaintiff claimed to have held these lands without payment of any assessment, but they were unable to produce any documentary evidence in support of their claim. Their ownership of the property had at times passed through various vicissitudes, and it was alleged that any sanad granted to them had been lost.

In 1845 one Venkatrao, who was the father of Bhimrao, the adoptive father of the plaintiff, and was the then head of the family, claimed to be entitled to these properties, and he made an application that his name should be entered in Government records; but he died in the year 1851, and after his death Government challenged the right of his son Bhimrao, who was a minor, and his widow Sheshawwa, who was managing the properties, to the privileges claimed, and in 1852 the lands in schedule *A*, which consisted of three villages, were attached by Government, and an enquiry into the rights of Venkatrao's heirs in respect of these properties in schedule *A* was instituted before the Inam Commissioner. In

1858 the Inam Commissioner made three separate orders in respect of these three villages which were all in the same form. The orders were that according to the evidence of the Hoozoor Records, these villages could not be properly regarded as belonging to the desai watan or in any light other than of Government villages during the lifetime of Venkatrao, and as he had died since the investigation started, the Inam Commissioner recorded his decision that the three villages should be at once resumed and assessed as khalsat.

Now a question arises, which is of some relevance, as to what the order of the Inam Commissioner that the villages should be resumed and assessed as khalsat, really amounted to. It is contended by the learned Government Pleader on behalf of respondent 1 that the order meant that the soil of the villages should be resumed by Government. On the other hand it is contended by the appellant that by the order it was meant only that the privilege claimed by the appellant of holding these villages free from liability to assessment was resumed. In connexion with that question it is necessary to consider what were the powers of the Inam Commissioner. He was appointed under Act 11 of 1852 which recites that in the districts therein mentioned in the Bombay Presidency, claims against Government on account of inams and other estates wholly or partially exempt from payment of land revenue are excepted from the cognizance of the ordinary civil Courts, and it is desirable that the said claims should be tried and determined without further delay. Then a Commissioner is appointed to determine these claims, and his duties are defined in Sch. A to the Act.

Section 4 provides :

> In the adjudication of claims to exempt lands or interests therein, the titles of claimants shall be determined by the rules in Sch. B annexed to this Act.

Schedule B provides as to what is to be done in the case of holdings which have been continuous, and then in Cl. 6 of Sch. B it is provided that :

> Land held as wholly exempt from payment of revenue, or on partial assessment, the possession of which is not continuable under the preceding rules, is to be resumed on the demise of the incumbent.

I have no doubt that the Commissioner acted under that rule and held that the claim of Venkatrao and his predecessors had not been continuous. The learned Government Pleader contends that the language of Cl. (6) of Sch. B is perfectly clear, and entitles Government to resume possession of the soil of the land; but I do not think that is so. It is clear from the whole terms of the Act that what had to be considered were claims made to hold lands free from, or partially free from, assessment, and in my judgment all that the Commissioner can do under the Act is to direct resumption by Government of the claim to exemption from assessment. That has been expressly held to be the meaning and effect of the Act in two cases which are binding upon this Court, the case in 1 B H C R 22[1] and the case in 9 Bom 419.[2] It is clear from the report of the first mentioned case that the resumption of possession considered in that case was made under the Inam Act of 1852, and I have no doubt that the resumption in the second case was also made under that Act, although the fact is not expressly mentioned in the report. In considering the meaning of Cl. (6) of Sch. B, one has also to notice the provisions of Cl. (11) which provides that :

> Any of these rules may be relaxed in favour of claimants under instructions from the Governor of Bombay in Council, in whom shall be vested the power of interpreting the precise meaning of any of the rules respecting which a question may arise.

There cannot, in my opinion be the slightest doubt that Government have construed those rules as entitling them only to resumption of possession of the privilege claimed by the inamdar, and not of possession of the soil. That is clear from the Government Resolution of 1854 referred to in 1 B H C R 22[1] and from a note annexed to a report from Colonel Etheridge, Inam Commissioner, to the Chief Secretary to Government, dated 21st April 1873. The note is to para. 8 of that report and says that :

> The Governor in Council does not conceive it probable that any of the local officers can so misread either Act 11 of 1852 or Regn. 17 of 1827 as to suppose that interference with actual possession is allowable.

It is therefore clear that Government have never considered that under the Inam Act they were entitled to interfere with actual possession. All that they could deal with was the claim of certain persons to hold lands free from the

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1. Vishnu Trimbak v. Tatia Pant, (1863) 1 B H C R 22.
2. Gangabai v. Kalapa Dari Mukrya, (1885) 9 Bom 419.

ordinary obligation to contribute to Government revenues. After the Inam Commissioner's orders of 1858, an appeal against them was lodged with Government on behalf of Bhimrao, and ultimately that appeal, and many other appeals against decisions of the Inam Commissioner, were compromised. Government made certain offers to inamdars which for the most part were accepted. On 4th August 1863, according to Ex. 73, Bhimrao, by his mother accepted an offer to pay four annas in the rupee on the total assessment. He was offered by Government the right to take in adoption a person outside the watan family, if he would pay another anna in the rupee; but it is admitted on this appeal that that option was not exercised.

It is contended by the appellant that that settlement of 4th August 1863 only applied to the lands in Schs. B and C which had not been attached, and that the settlement in respect of the lands in Sch. A was arrived at on 16th March 1864, and was a settlement on the terms of paying five annas in the rupee. The learned Government Pleader contends that the settlement of 4th August 1863 covered all the lands. I do not think it very material which view is right. At any rate, there is no question that a settlement was arrived at which covered all the lands in the three schedules and provided for the payment by the inamdar of certain fixed dues. I should have mentioned, though I do not think it very material, that before the settlement was arrived at, the attachment of the villages in Sch. A had been released by Government, presumably on the basis that a settlement was about to be arrived at. It was in those circumstances that the sanad of 1872 came to be granted, and it is not disputed that the sanad was intended to give effect to the settlement arrived at between Government and Bhimrao acting by his mother. The sanad has not been completely translated, but the relevant paragraphs have been translated in Ex. 84 in First Appeal No. 177 of 1931. The sanad describes the lands and cash allowances to which it applies, and then it provides in para. 1 as follows :

> Persons who enjoy the said lands and cash allowances have agreed to pay to Government a fixed sum every year in lieu of service. Therefore it is (hereby) declared as follows : The said lands and cash allowances shall be continued in lineal succession from generation to generation by the British Government under the following conditions. Those conditions are : The said persons in enjoyment and their heirs shall be obedient to the British Government and act faithfully and honestly and shall go on paying to Government permanently, every year amounts as mentioned below.

Then the amount of the agreed assessment is stated. Now if I am right in thinking that the only settlement arrived at between Government and the inamdar was as to the right to hold the lands free from full assessment, and that the settlement arrived at and the action Government had taken before such settlement had no reference to the right to occupy the soil, then it seems to me that we must in those circumstances construe the sanad as dealing only with the right to hold the lands free from full assessment. The language seems to be appropriate to such a construction. It does not purport to be a grant of the right of the lands. It only provides that the lands and cash allowances shall be continued. That is consistent with the view that what is continued is the right to hold free from full assessment and that right is continued upon the conditions specified which include the payment of a fixed duty. If that is the correct interpretation of para. 1 of the sanad, then if either of the conditions of the grant, i. e. the condition of being faithful to Government and the condition of paying a fixed duty is broken, the grant would terminate, and Government would be entitled to claim full assessment on the lands, but any right of occupation which the inamdar possessed apart from the sanad would remain untouched. If however I am wrong in that view, and if the learned Government Pleader is right in his contention that the sanad covers the right to the soil, it would follow that the soil is granted to the inamdar so long as the two conditions, which I have referred to, are performed, and there is no suggestion that either of those conditions has been broken. I doubt if the words "in lineal succession from generation to generation" are to be construed in their literal sense as meaning descent from father to son. I think they really are equivalent to "continued to the owner and his heirs" because the conditions imposed are not upon lineal heirs but were imposed upon heirs generally. But, however that may be, the plaintiff, as I will mention in a moment, is the adopted son of Bhimrao, and he is, therefore, in my opinion, clearly a lineal descendant of Bhimrao. Under Hindu law an adopted son is in exactly the same position, with one or two minor exceptions not necessary to notice, as a natural born son, and I have no doubt that an adopted son of a Hindu can properly be described as succeeding in lineal succession. Possession cannot therefore be claimed by Government under para. 1 of the sanad. The ground on which Government claimed to resume possession of the land dealt with by the sanad, arises under clause 2 of the sanad which is numbered No. "1" and which I will refer to as "Proviso 1". It is in these terms :

> So long as there are male heirs, i. e. direct or indirect of the watan or so long as there is any person adopted in the watandar family, the said lands and cash allowances shall be continued by Government without taking service and without demanding anything more than the abovementioned fixed amounts and without any objection or question as 'to the rights of the persons in enjoyment'.

Now it is claimed by Government that there are no male heirs of the watan, and that there is no person adopted in the watandar family, and I will assume that to be so, and I will assume further, in considering the construction of Proviso 1, that the sanad deals with rights in the soil. Even on those two assumptions, I am unable to accept the view of the lower Court that Government are entitled to resume possession of the lands under Proviso 1. That clause is not a clause of re-entry. What it provides is that so long as there are the requisite heirs, the lands and cash allowances shall be continued by Government without taking service and without demanding enhanced assessment. Stating the clause in its converse form, it comes to no more than this : That whilst there is no requisite heir to the watandar, Government are entitled to insist on service or further assessment. That seems to me the highest at which the rights of Government can be put. I can see no ground under that clause to justify Government in resuming possession of the property, the subject matter of the grant.

Bhimrao adopted the plaintiff, who was his daughter's son in the year 1909 and he died in the year 1918. Subsequently Government passed orders resuming possession of the lands and cash allowance in suit. Defendants 3 and 4 are collateral heirs of Bhimrao, and they are within the original watandar family. It is contended by Mr. Desai for the appellant that in any case Government cannot re-enter at the present time, because there are heirs of the watan. The answer made by Government is that the sanad constitutes a fresh grant of the watan, and that defendants 3 and 4 are not heirs of Bhimrao, the first watandar. I do not think it necessary to decide which of those two views is right. The claim of the plaintiff to be entitled to the watan as the adopted son of Bhimrao has been disputed by defendants 3 and 4, but so far as relates to their claim, this Court is bound by the decision in 27 Bom 75,[3] which establishes that the adoption by a watandar without the consent of the Government or of the other members of the family is good as between himself and the other members of the family. It is quite true, as pointed out by the learned Government Pleader, that the Government were not parties to that decision, and the decision does not go to the length of saying that the Government are bound to recognize the title of the adopted son to the watan. The learned Government Pleader has suggested that we should refer the correctness of that decision to a Full Bench, but in view of the length of time it has stood and the number of titles which are probably dependent upon it, we think that no Full Bench would be inclined to interfere with it. So that we are bound to hold that the plaintiff as a validly adopted son of Bhimrao is the watandar as between himself and the collateral heirs of Bhimrao. Government may or may not have a right under Proviso 1 in the sanad to demand service or further assessment. That question has not been urged and is not I think open on this appeal, because the plaintiff originally asked Government to deal with him on that footing. He was willing to pay full assessment. But Government insisted on their right to resume possession of the whole of this property, which, I may say, is extensive and comprises something like 14,000 acres of land. In my opinion Government have no right to resume possession of this land, and that is the only point with which we can deal on this appeal.

In my judgment the plaintiff is entitled to a declaration that the orders passed by the Government of Bombay in Resolution No. 7276/24, dated 16th August 1928, under which they resumed possession, are illegal and ultra vires, and cannot be enforced against the plaintiff, and I think we ought to grant the injunction asked for in para. 3 of the prayer in the plaint, and a declaration as to the plaintiff's right to the amounts collected by Government officers asked for in para. 4, and make an order for restitution of possession of the lands to the plaintiff. I am not prepared to make the declaration asked for in para. 2 of the prayer, namely that plaintiff, as the legally adopted son of Bhimrao Venkatrao Desai, is entitled to hold as owner the entire watan property described in Schs. A, B, C and D. I think that that declaration might be construed to mean that Government are bound to recognize the plaintiff as holder of the watan, on the terms of the sanad, without liability to further assessment and as at present advised, I am not satisfied as to the correctness of that proposition. The claim to the cash allowance in Sch. D will by consent stand over. The appeal must be allowed with costs, and the plaintiff is entitled to the costs in the lower Court.

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[3] Balaji v. Datto, (1902) 27 Bom 75=4 Bom L R 762.

N. J. Wadia, J.—The appeal turns in the main on the interpretation of the sanad which was granted to Bhimrao in 1872. That sanad followed an enquiry by the Inam Commissioner into the right which Bhimrao, the plaintiff's adoptive father, claimed to hold the property in the suit free of assessment as desgat watan. In 1854 the three villages of Girisagar, Birkhabbi and Bhaganagar, included in Sch. A attached to the plaint, were attached under the orders of Government on the ground that they were not desgat watan, but were held as a jahagir, i. e. on a non-service tenure. An enquiry by the Inam Commissioner followed with regard to each of these three villages and in October 1858, Major Gordon, the Inam Commissioner, decided with regard to all these three villages that they could not properly be regarded as belonging to the desai watan or in any light other than of Government villages continuable under the Proviso 1 to R. 6 of Sch. B, Rent-free Estates Act (11 of 1852) during the lifetime of the claimant, and that as the claimant had died since the commencement of the investigation, the villages should be at once resumed and assessed as khalsat. Against these orders, Bhimrao the son of the deceased inamdar, appealed. These appeals were not decided by Government, but in 1864 an offer was made to Bhimrao that if he agreed, summary settlement in respect of the properties pertaining to his watan would be applicable to him on certain conditions which Government laid down. Bhimrao accepted those conditions and in 1872 a sanad was granted. That sanad was in the form known as the Gordon Sanad as is clear both from the terms of the sanad and from the reports made by the Government Officers prior to the granting of that sanad. The Collector in the Report which he made, and which is referred to in the Preamble to Government Resolution No. 7276/24, dated 16th February 1927 (Ex. 103 in this case), states that the Gordon Sanad settling this desgat watan was issued on 8th February 1872. The Commissioner in his Report of 27th August 1926 also mentions that the villages were settled in 1864, under the Gordon Settlement applicable to District Hereditary Offices' Watans. The copy of the sanad which has been put in is unfortunately torn and para. 1 of the Gordon Settlement Sanad does not, therefore, appear in the sanad before us. That the sanad was however in the form of the Gordon Settlement Sanad is not disputed by the learned Government Pleader. The sanad mentions that the lands and cash allowances entered in the Government Records hereditarily shall be continued in lineal succession from generation to generation on condition that the persons in enjoyment and their heirs shall be obedient to the British Government and act faithfully and honestly and shall go on paying to Government permanently the judi of Rs. 1,653-1-0 mentioned in the sanad.

The contention of Government is that they were entitled to resume the whole watan property, because on the death of Bhimrao there was no male heir to the watan, lineal, collateral or adopted, within the limits of the watandar family as required by the first condition of the sanad. The plaintiff has been found to be validly adopted by the last holder of the watan, Bhimrao. It is admitted that he is not a member of the watandar family, being a son of Bhimrao's daughter.

Two questions arise: first, whether, assuming that the plaintiff is not such an heir to the watan as is mentioned in the first condition, Government are entitled to resume the watan; and, secondly, if they are entitled to resume, whether that resumption could be of the lands themselves or only of the exemption from payment of full assessment and from liability to service. The contention of Government is that they are entitled to resume the actual lands. The terms of the Gordon Settlement Sanad were interpreted by this Court as early as 1902 in 27 Bom 75,[3] and it was held that the terms of the sanad did not prohibit the adoption of a person from outside the watandar family and that a person so adopted must be held to be validly adopted, and would be entitled to the watan as against the other members of the watandar family. It seems to me that so far as Government are concerned, the only circumstances in which they could resume the watan under the terms of the sanad would be on breach by the holders of the watan of either of the two conditions referred to in para. 2 of the sanad, i. e. if they were disloyal to Government, or if they failed to pay the fixed yearly dues mentioned in the said sanad. Admittedly neither of these contingencies has occurred. The first condition of the sanad which provides that the lands and cash allowances mentioned in the earlier part of the sanad shall be continued without demand of service and without increase of the amount of tax over the fixed amount and without objection or question on the part of the Government as to the rights of any holders thereof, so long as any male heir to the watan, lineal, collateral or adopted, within the limits of the watandar family, shall be in existence, can only give Government the right to levy full assessment on the land or to demand service if the watan has passed to an heir who does not answer to the description given in that condition. But it cannot give to Government the right to resume the watan. The condition deals not with the duties imposed on the holders of the watan, but with the terms on which Government were prepared to concede to the holder the right of exemption from full assessment and from the obligation to perform service; and the passing of the lands to an heir other than that described in the condition could only result in relieving Government from the obligation not to increase the land tax and not to demand service. The condition cannot control the terms of the operative part of the sanad by which the lands were to be continued hereditarily to the grantees so long as they remained loyal and continued to pay the fixed dues mentioned in the sanad. It cannot be said that the plaintiff who has been found to be a validly adopted son of the last holder of the watan, is not an heir within the meaning of the second paragraph, the operative paragraph of the sanad. On this view, Government would not be entitled to resume the watan. Even, however, if a contrary view were taken, resumption cannot in my opinion entitle Government to evict the plaintiff from the lands. All that it could entitle them to do would be to consider themselves absolved from the obligation mentioned in the first condition of the sanad, namely the obligation not to increase the land tax beyond the amount mentioned in the sanad.

The sanad was granted as I have said under the summary settlement under the terms of Act XI of 1852. That Act gave power to Government to appoint Inam Commissioners to enquire into claims against Government on account of inams and other estates wholly or partially exempt from payment of land revenue. The object of the Act was confined to providing a summary mode of disposing of claims to exemption from payment of revenue. The Act gave no power to the Inam Commissioner to decide questions as to the right to possession of the lands. In the report of Colonel Etheridge, the Alienation Officer, of 21st April 1873, printed in the Narrative of the Bombay Inam Commission, it is stated that under the enquiry held by the Inam Commissioner, "Eviction was illegal. In other words possession could not be interfered with." And in support of his view he has referred to a Circular issued by the Government of Bombay in 1854 being Circular Letter No. 2449, dated 27th May 1854, in which it was stated that :

> All that the adjudicating authority (the Inam Commissioner or Collector) can try is the title to exemption from assessment. In the event therefore of the claim of an inamdar who is in occupation of the land being disallowed, the inamdar must nevertheless be permitted to continue in possession of the land for so long as he pays the full assessment imposable on the land as khalsat land according to the revenue survey settlement . . .

and that

> in cases in which the claimant, whose title as inamdar is disallowed, has only enjoyed the Government right that is the assessment on the land the occupant will remain in possession and pay direct to the village officers on account of Government instead of the inamdar or his agent.

It cannot therefore be argued as has been contended by the learned Government Pleader that when the Inam Commissioner in his three reports of October 1858 decided that all the three villages should be resumed and assessed as khalsat, he meant anything more than that the exemption from liability to pay assessment which the then inamdar had claimed was to be resumed and that the inamdar was to be relegated to the position of an ordinary occupant liable to pay full assessment on the land. Even therefore if under the first condition of the sanad the Government were entitled to resume the watan, they could not under the terms of the sanad evict the plaintiff from the actual possession of the lands. The plaintiff is entitled to the declaration which he has asked for that the orders issued by Government are illegal and ultra vires, and to the injunction. I agree therefore that the appeal should be allowed.

Per Curiam: Beaumont, C. J. — The appeal as regards property D will stand over on Mr. Desai's undertaking to lodge a fresh application to the Collector within one month after obtaining a copy of the judgment.

S.C./R.K. *Appeal allowed.*

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* A. I. R. 1937 Bombay 472

BEAUMONT, C. J. AND BLACKWELL, J.

Wellington Cinema Co.—Defendants — Appellants.

v.

Performing Right Society, Ltd. — Plaintiffs—Respondents.

Appeal No. 55 of 1936, Decided on 9th March 1937, from Suit No. 1585 of 1934.

*** (a) Copyright Act (English, 1911, as extended to India by Indian Copyright Act, 1914), S. 2 (1)—Making cinematograph record of musical work without consent of owner of its copyright is infringement.**

A copyright of a musical work is infringed under S. 2 (1), English Copyright Act, by making any cinematograph record of such musical work without the consent of the owner of its copyright. [P 473 C 1]

*** (b) Copyright Act (English, 1911, as extended to India by Indian Copyright Act, 1914), S. 19—Scope—S. 19 presupposes lawful making of record and lawful existence of plate from which record is made—Previous consent of owner of copyright necessary before making plate—Owner can refuse consent or give consent subject to conditions, in effect restricting copyright available to owner of plate under S. 19.**

Even though S. 19, English Copyright Act, does not in terms provide that the copyright under S. 19 only exists where a record is made with the consent of the owner of the copyright in the original work if such a person exists, still the section must be limited to a lawful making of a record. The copyright conferred by S. 19 of the Act, on the owner of the plate from which the record is made, presupposes that that plate came to existence lawfully. If that is so, then, where the original work is the subject matter of copyright, it necessarily follows that the consent of the owner of that copyright must be obtained to the making of the plate and if such consent must be obtained, obviously it would be lawful for the owner to refuse such consent, and if the owner is entitled to refuse his consent then it is legitimate for him to give his consent subject to certain conditions, and those conditions may involve restricting the copyright which the owner of the plate would otherwise acquire under S. 19. Such copyright might be restricted in various ways, amongst others, by restricting the public performance of records made from the plate, [P 473 C 2]

(c) Deed—Construction—Powers of Court—Court can read words in document to reconcile conflicting clauses or to give effect to real intention of parties—It cannot do so when document as it stands can be given rational meaning.

A Court of construction is entitled to read words into a document if that procedure is necessary in order to reconcile conflicting clauses or otherwise to give effect to what the Court considers from a perusal of the whole of the document to have been the real intention of the parties, but on the other hand, a Court of construction is not entitled to read words which are not there into a document if the document as it stands can be given a rational meaning. [P 474 C 2]

Lalji Gokuldas and *D. B. Desai* — for Appellants.

C. K. Daphtary and *K. McI. Kemp* (*Advocate General*)—for Respondents.

Beaumont, C. J.—This is an appeal from a judgment of Barlee, J., and the case raises certain questions of copyright law. The plaintiffs in their plaint allege that they are the assignees of the copyright in four songs, and they annex to the plaint the assignments to themselves of such copyright. The relevant assignment annexed to the plaint is Ex. P, which as matter of construction, in my opinion, clearly assigns to the plaintiffs the copyright in the songs in question. The date of Ex. P is 13th September 1934. At the trial the plaintiffs sought to rely on an earlier assignment made in January 1934, but the learned Judge, rightly in my opinion, refused to let them rely on a document of title which they had not pleaded. The relevance of the point is that the license on which the defendants base their title was granted in July 1934, and an assignment made in the following September would be subject to the license previously granted by the assignors, whereas if the assignment was made in January, before the defendants' license, the assignment would not be subject to the license. However, we must, in my opinion, deal with the case on the footing that the plaintiffs' title accrued in September 1934, and is therefore subject to the license to the defendants, whatever that license may amount to. The plaintiffs allege in the plaint that the defendants infringed their copyright by giving a public performance of these songs as part of the exhibition of a film entitled "Love, Life and Laughter". A public exhibition of the film in question, which admittedly contained these songs, was given on 20th September 1934, and the question is whether in law the giving of that performance of the film "Love, Life and Laughter" embodying these songs amounted to an infringement of the plaintiffs' copyright.

Copyright in works which are mechanically performed was given for the first time by the Imperial Copyright Act of 1911, which is extended to India by the Indian Copyright Act, 1914. Under S. 1 (2) of the Act of 1911 copyright is defined, so far as material for this case, as meaning the sole right to produce or re-produce the work or any substantial part thereof in any material form whatsoever, and it is provided that the right shall include the sole right, in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorize any such acts as aforesaid. Then S. 2 defines what amounts to infringement of copyright, and in sub-s. (1) it is provided that copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything, the sole right to do which is by the Act conferred on the owner of the copyright. So that copyright would be infringed under the section by making any cinematograph record of a musical work, in which copyright existed, without the consent of the owner of the copyright. Then S. 5 provides that subject to the provisions of the Act, the author of a work shall be the first owner of the copyright therein. Then we come to S. 19, on which the defendants base their title. That section provides that:

> Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically re-produced, in like manner as if such contrivances were musical works, but the term of copyright shall be 50 years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work.

Now it is curious that S. 19, which confers copyright on the maker of a record, to use a compendious term, on the basis that he is to be deemed to be the author of the work, does not provide that the making of the record must be a lawful act. It does not in terms provide that the copyright under S. 19 only exists where a record is made with the consent of the owner of the copyright in the original work, if such a person exists. But in my opinion we must limit the section to a lawful making of a record. It cannot be supposed that the Legislature, which had conferred by the earlier sections of the Act the right to restrain the reproduction of a literary, dramatic or musical work by mechanical means without the consent of the owner of the copyright, intended by S. 19 to confer copyright on an infringer of the owner's rights. In my opinion therefore the copyright conferred by S. 19 on the owner of the plate from which the record is made, presupposes that that plate came into existence lawfully. If that is so, then, where the original work is the subject matter of copyright, it necessarily follows that the consent of the owner of that copyright must be obtained to the making of the plate, and if such consent must be obtained, obviously it would be lawful for the owner to refuse such consent and if the owner is entitled to refuse his consent, I apprehend that it is legitimate for him to give his consent subject to certain conditions, and that those conditions may involve restricting the copyright which the owner of the plate would otherwise acquire under S. 19. Such copyright might be restricted in various ways, amongst others, by restricting the public performance of records made from the plate.

There is very little authority on S. 19, but we have been referred to the case in (1934) Ch 450[1] in which Lord Maugham, then Maugham, J., discussed the section in some detail, and expressed opinions on various difficulties which arise under it. That was a case in which copyright in the original work had expired, and the work was in what is usually called "the public domain", so that the actual point with which we have to deal in this case did not arise. But Lord Maugham notices the difficulty that S. 19 does not in terms require the making of the record to be a lawful act, and he assumes for the purposes of his judgment that the rights under S. 19 would only accrue where the making of the record was lawful, and it is I think clear from his judgment that he considered that such assumption was well-founded in law. He also expressed the opinion, which was material in connexion with the reasons which he gave for his decision, though it did not actually arise for decision in that case, that the copyright which is conferred upon the maker of a plate under S. 19 is subsidiary to any subsisting copyright in the original work. Mr. Lalji for the appellants has contended that that opinion of Lord Maugham is not correct, and should be treated as obiter, because in the case before him there was no copyright in the original work. It is not in my opinion necessary for us to express any opinion on that particular point; and for this reason, that the license which was given to the defendants in this case to make a record of these songs was not a license which merely authorized the making of the record, leaving it then a question to be determined whether the rights which accrued to the maker of the record under S. 19 were subject to the rights of the owner of copyright in the original work, but it was a license which imposed definite conditions and either as the appellants say, expressly authorized the public performance of the record containing the songs in question, or as the respondents say, expressly negatived such right of public performance. Assuming therefore that I am right in thinking that under S. 19 the right to copyright in the maker of the record would only accrue if the record were properly made, and that that right is subject to any conditions imposed by the license under which the record is made, then the sole question on this appeal turns on the construction of the license which was given by the predecessors of the plaintiffs to the defendants or those under whom they claim. Now that license is Ex. K, and, so far as material, is in these terms. It is a license to the Associated Talking Pictures, Ltd., through whom the defendants claim,

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[1] Gramophone Co. v. Stephen Cawardine & Co., (1934) Ch 450 = 103 L J Ch 248 = 150 L T 396=77 S J 914=50 T L R 140.

"to make and/or import films and/or records recording or reproducing the musical works and/or parts thereof the title and particulars whereof are set forth in Columns 2 and 3 of the schedule hereto"

(and the schedule includes these four songs)

"for use in the production and exhibition of the Film entitled "Love, Life and Laughter" at Cinemas or Theaters situate in the territory of Great Britain, Northern Ireland, the Irish Free State and the Dominions and Colonies of the British Empire (excepting Australia, New Zealand and Canada)".

Then follows this provision:

This license shall not confer on the licensee the right to perform the said musical works or any part thereof in public and permission to perform the same shall (if required) be obtained by the licensee from the owner or controller of the performing right therein.

It is contended on behalf of the appellants that the first portion of that license is a license to make a film or record reproducing the songs in question for use in the exhibition of the film entitled "Love, Life and Laughter" at the places specified, and that that involves a right to exhibit the film including these songs in public, and it is contended that part 2 of the license which provides that the license shall not confer the right to perform the musical works in public applies only to the performance of those works apart from the film, that is, to the performance of the songs as songs, independently of their performance as part of the film of "Love, Life and Laughter". That construction undoubtedly involves reading into the second portion of the license some words which are not there. After the word "perform" one would have to read some such words as "apart from performance as part of the said film". A Court of construction is entitled to read words into a document if that procedure is necessary in order to reconcile conflicting clauses or otherwise to give effect to what the Court considers from a perusal of the whole of the document to have been the real intention of the parties, but, on the other hand, a Court of construction is not entitled to read words which are not there into a document if the document as it stands can be given a rational meaning. The construction which the respondents ask us to place upon the license is this: They say it is a license to make a film or record recording or reproducing the songs in question, the purpose for which the songs are to be reproduced being for use in the production and exhibition of the film "Love, Life and Laughter" at the places specified. They dispute that para. 1 of the license would by itself confer any right to perform the film including these songs in public. They say that the license is confined to making copies of the works in question, and does not deal with performing rights. But, even assuming that Cl. 1, standing by itself, would authorize the performance of these songs in public, it is contended that the second part is not really inconsistent with the first part. The first part authorizes the making of a film reproducing these songs, the purpose of such reproduction being for use in the production and exhibition of the film at the places specified, and then the second part of the clause merely amounts to a proviso restricting to a limited extent the carrying out of that purpose by providing that so far as the purpose of user of these songs in the exhibition of the film involves public performance of the songs, that purpose cannot be carried into effect without obtaining the license of the owner of the copyright in the songs. It seems to me that the respondents' construction of the license is the right one, and that we should not, in the circumstances, be justified in reading into the license the words which the appellants ask us to read into it. I think the license merely confers a right to make a film including these songs, the purpose being the use of the songs in the production and exhibition of the film, but so that that purpose cannot be carried out to the extent of performing in public the film including the songs without obtaining a license from the owner of the copyright in the songs. That was the view substantially, which the learned Judge took of the meaning of the license. In my opinion the Judge was right in granting an injunction, and damages, the amount of which has been agreed at Rs. 150. The appeal therefore must be dismissed with costs.

Blackwell, J.—I am of the same opinion. Although S. 19, Copyright Act, does not in terms contain any provision requiring a person who makes a record of a musical work to obtain the consent of the owner of the copyright in that work, I think the obtaining of such consent is necessarily involved by reason of other sections in the Act. S. 2 (1) provides that copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright. Among other rights conferred upon the owner by S. 1 is the sole right, in the case of a musical work, to make any record or other contrivance by means of which the work may be mechanically performed, and to authorize that act among other acts. Again sub-s. (2) of S. 19 provides that it shall not be deemed to be an infringement of copyright in any musical work for any person to make, among other things, records, if such person proves that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright. These various provisions, in my opinion, clearly indicate that no person is entitled to make a record without first obtaining the consent of the original owner of the copyright. Sub-s. (2) of S. 5 provides that the owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations, and may grant any interest in the right by license. By S. 1 copyright includes various rights, which are distinct and independent rights, viz. the right to produce or reproduce the work, the right to perform it, and the right to make records or other mechanical contrivances. By virtue of sub-s. (2) of S. 5 therefore, the owner may grant any interest in any of those rights by license, and any person who seeks to make a record of a musical work, and has to obtain the consent of the original owner so to do, can, in my opinion, only make that record strictly in accordance with the license granted to him.

I come now to the construction of Ex. K, upon the true construction of which, in my opinion, this appeal turns: It is a license to make and/or import films and/or records recording or reproducing the musical works specified in the schedule for use in the production and exhibition of the film entitled 'Love, Life and Laughter' at the places therein mentioned. It has been contended on behalf of the appellants that the moment the Associated Talking Pictures, Ltd., through whom the appellants claim, obtained the license to make and import the films as provided in the first part of the license, they acquired thereby a statutory right of copyright as provided by sub-s. (1) of S. 19. It is argued that by reason of that statutory copyright the Associated Talking Pictures, Ltd. necessarily acquired the right of public performance, and that the only way in which they could thereafter be deprived of that right would be by an assignment by them back to the original owner of the copyright in the musical work or to some other person. In my opinion that argument is fallacious. It assumes that the license was a license to make and import the films simpliciter. It has been contended by the respondents that the first part of the license is merely a license to make and import the films for use in the production and exhibition of the film of 'Love, Life and Laughter' at the places therein mentioned, and that the first part of that license does not per se give a right of performance. It has been said that it would have been quite easy to use the words 'and to perform the said film' if a license to perform had been intended to be given. I think that there is great force in this argument. But, even assuming that the first part of the license as it stands would if there were nothing else in the license to indicate the contrary have conferred a right of public performance, in my opinion it is essential to read the license as a whole before deciding what rights were intended to be conveyed by that license. The second part of the license in terms provides that it is not to confer on the licensee the right to perform the said musical works or any part thereof independently, and that permission to perform the same shall be obtained by the licensee from the owner or controller of the performing right therein. It is contended for the appellants that the meaning of this part of the license is that the license is not to confer the right to perform the musical works except so far as the right is given by the first part of the license to perform the musical work by means of a record in the production and exhibition of the film. That, however, obviously involves reading into the second part of the license words which are not there. I do not think that the Court is justified in doing that, if, looking at the license as a whole, the Court as a matter of construction comes to the conclusion that the intention of the grantor of the license was to grant a license in respect of one only of the rights which he has by virtue of S. 1, Copyright Act.

In my opinion therefore the appellants did not acquire through the Associated Talking Pictures, Ltd. the right of performance of these songs in connexion with the films without first obtaining the consent of the owners of the copyright. Accordingly, I think the learned Judge came to the right conclusion, and that this appeal must be dismissed with costs.

A.L./R.K. *Appeal dismissed.*

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* A. I. R. 1937 Bombay 476

BEAUMONT, C. J.

Guljarkhan Abdul Gafurkhan Sarguro — Plaintiff — Applicant.

v.

Husenkhan Vaidkhan Sarguro — Defendant 1 — Opponent.

Civil Revn. Appln. No. 151 of 1936, Decided on 7th April 1937, against order of First Class Sub-Judge, Ratnagiri.

*** Civil P. C. (1908), O. 21, R. 63 — Creditor should not be compelled to file representative suit, when he wants to file it only on his own behalf.**

A suit brought under O. 21, R. 63, C. P. C., by a judgment creditor need not in all cases be filed on behalf of the plaintiff and all other creditors. There is no reason why the creditor should be compelled to prove that the document was made with intent to defeat and delay creditors generally if he only wants a declaration in a limited form that the transfer is void as against him. Such a declaration would leave the transferee entitled to any balance of the proceeds of sale after satisfying the execution creditor. [P 477 C 1]

Y. V. Dixit — for Applicant.

B. N. Gokhale for *G. B. Chitale* — for Opponent 1.

Order. — This is an application in revision against an order made in appeal by the First Class Subordinate Judge of Ratnagiri. The position is that the present applicant obtained a money decree against opponents 2 and 3, which he applied to execute and opponent 1 intervened on the ground that the property had been sold to him by opponents 2 and 3. That intervention succeeded, and thereupon the applicant filed a suit for a declaration that the sale deed on which the opponents based their claim is void, and that the property is liable to be sold. That application was made under O. 21, R. 63. The trial Judge decreed the plaintiff's suit but on appeal the Appellate Court raised an issue, "Is this suit under S. 53, T. P. Act?", and held that it was and that therefore the suit was not maintainable. The Judge therefore allowed the appeal without going into the merits.

Now in the first place the point that this is a suit under S. 53, T. P. Act, and should therefore have been by the plaintiff on behalf of himself and all other creditors was not pleaded as it ought to have been under O. 8, R. 2, and that being so I think that the lower Appellate Court ought not to have allowed the point to be raised. I may say however that I am by no means satisfied that a suit brought under O. 21, R. 63, by the judgment-creditor must in all cases be filed on behalf of the plaintiff and all other creditors, notwithstanding a note to that effect in Sir Dinshaw Mulla's book on the Transfer of Property Act. I do not see why the creditor should be compelled to prove that the document was made with intent to defeat and delay creditors generally, if he only wants a declaration in a limited form that the transfer is void as against him. Such a declaration would leave the transferee entitled to any balance of the proceeds of sale after satisfying the execution creditor and it may well be that the declaration made in this by the trial Court was unnecessarily wide and should have been confined to the interest only of the plaintiff. However, that is a point which the lower Appellate Court can deal with when it disposes of the appeal on the merits. In my opinion the lower Appellate Court was wrong in allowing the appeal on the preliminary point. The decree of the lower Appellate Court is set aside and the case will be sent back to the lower Appellate Court to be dealt with on the merits on the footing that the suit is well constituted. The respondents must pay the costs of this application.

B.D./R.K. *Case remanded.*

A. I. R. 1937 Bombay 477

BEAUMONT, C. J. AND BLACKWELL, J.

Tribhovandas Motilal and *others* —
Plaintiffs — Appellants.

v.

Bhikhubhai Ravchand and *another* —
Defendants — Respondents.

Appeal No. 71 of 1936, Decided on 5th April 1937, from Suit No. 386 of 1936.

Bombay Native Share and Stock Brokers' Association Rules, Rules 15, 17 and 19 - Card gives only personal right to holder— Member of Association dying sonless — Will, making widow owner of property for life and property to pass to beneficiary after her death— Sale of membership card by widow — Sale proceeds belong to widow and do not form part of estate of deceased – Widow need not account to beneficiary for sale proceeds.

Under cl. 12 of the Deed of Association, a membership card gives a merely personal right to the holder and does not constitute in the ordinary sense property. [P 478 C 1]

Where a member of the Bombay Native Share and Stock Brokers' Association died leaving a will under which his widow was entitled to the income of his property for her life and after her death the income passed to a beneficiary and the widow sold the membership card of the Association, the sale proceeds of the card belong to the widow and do not form part of the corpus of the estate, in which the beneficiary is interested. Hence the widow need not account for them to the beneficiary under her husband's will : *A I R 1932 P C 186, Ref.* [P 478 C 2 ; P 479 C 1]

C. K. Daphtary and *M. M. Desai* —
for Appellants.

V. F. Taraporewala and *K. M. Munshi*
for Respondents.

Beaumont, C. J. — This is an appeal from a decision of Kania, J. which raises a question as to the title to the proceeds of a card held by a deceased member in the Bombay Native Share and Stock Brokers' Association. The member in question was one Dipchand, who died in the year 1918, and it is admitted for the purposes of this appeal that under his will his widow Parsanbai was entitled to the income of the estate for her life, and after her death it passed to the plaintiffs as the heirs of their brother Rasiklal, who was the beneficiary named in the testator's will. But the plaintiffs are not the heirs-at-law of the testator. After the death of the testator his widow applied to the Bombay Native Share and Stock Brokers' Association to allow the testator's card to be sold to one Nansi Monji. The Association in reply asked her certain questions, amongst others, what was her title to the card, and she replied that under the will of the testator she was his sole heir. That seems to have been a mistake, as she was in fact only a tenant for life, and the Association thereupon paid to her Rs. 36,000, which was the purchase money of a card, and recovered the amount from the purchaser, who was elected a member of the Association. The question which arises on this appeal is whether the widow is entitled in her own right to the proceeds of sale of the card, or whether those proceeds form part of the corpus of the estate, in which the plaintiffs are interested. The question, in my opinion, turns on the construction of the deed of settlement and rules of the Association. Those documents were construed by this Court, and afterwards in appeal by the Privy Council, in 34 Bom L R 1178.[1] But that case dealt with the title to the card on the insolvency, and not on the death of a member.

It is quite clear, I think, from cl. 12 of the deed constituting the Association, that a card gives a merely personal right to the holder, and does not constitute in the ordinary sense property. The rules deal with the case of death of a holder of a card. The rules are very badly drafted, and obviously the framers of the rules had not considered the various cases which might arise. The difficulty of construing the rules is not diminished by the fact that members of this Association may include Hindus, Mahomedans, Parsis, Indian Christians, and Jews, and that the laws of inheritance affecting those various communities differ materially, and in the case of a member of the first two communities there may be more than one widow. R. 13 provides that after the death of a certified broker, his card shall be given to his son, and no fee shall be charged over again for the same. That seems to give an absolute right to the son to receive the card irrespective of any provisions the father may have made in his will, and irrespective also of whether the father was solvent or not at the time of his death. R. 14 deals with the case of there being more than one son and the eldest son already being a member of the Association, and it provides in that event for one of the other sons receiving the card. Then R. 15 provides that if the deceased broker has no "child," which I think must mean son, the card shall be sold to the person to whom the widow of the deceased of the executor wants to sell. But before the sale of the card a written application from that party shall be taken as per rules. If that application is sanctioned by the Board, a receipt of the card moneys being received by the widow of the deceased or the executor shall be taken and kept. Then R. 17 provides :

> If there is no relative of the deceased broker, who can continue the business of that broker, his card shall be sold as per rules of the Association and whatever sale proceeds may be realized in respect of the same, shall be handed over to his widow or other heir entitled according to law.

It is certainly difficult to construe those rules and to reconcile Rr. 15 and 17. In the present case the sale was, in my opinion, made under R. 15, and under that rule the proceeds of sale were paid to the widow, and I think it quite clear that they were paid to her as widow and not as executrix, though I am told she is in fact the executrix as well as the widow. However, she made no claim to the moneys as executrix, and I think they were paid to her as widow. To my mind, the answer to the plaintiffs' claim is that those moneys having been rightly paid to the widow, there is nothing in the rules which makes her accountable for them to the beneficiaries under her husband's will. No doubt some difficulty is introduced under R. 15 by the reference to an executor. Mr. Taraporewala admits that if the executor receives the moneys, he cannot hold them for his own benefit, but he contends, reading Rr. 15 and 17 together, that the executor would hold them in trust for the heir-at-law and not for the beneficiaries under the will ; because he argues that the rules did not contemplate creditors of the deceased member getting hold of the proceeds of sale, and if the executor were to hold the proceeds as part of the testator's estate, creditors would be entitled to be paid before beneficiaries under the will. Mr. Taraporewala therefore contends that the executor would hold the moneys in trust for the persons who would be the heirs of the deceased member as upon an intestacy, but not as part of the estate.

On the other hand Mr. Daphtary for the appellant contends that the executor would hold the moneys as part of the estate, and he argues that if the executor would so hold the moneys, the widow, if she receives them, must also hold them as part of the estate. I do not think it is necessary to express any opinion as to the character in which the executor would hold the moneys if paid them under R. 15. When that case arises, the executor, if he is wise, will apply to a Court for directions as to how he ought to deal with the moneys paid to him. Dealing with this case simply as one under R. 15, it seems to me that the moneys were properly paid to the widow, and there is nothing in the rest of the rules which expressly or by necessary implication requires her to account for them to the beneficiaries under the will. We are not considering the case of the heirs of the testator, and I am told in fact the widow is the heir-at-law of the testator. The appellants have got to base their case on being beneficiaries under the will. If the case falls under R. 15, I do not think that R. 17 applies, because the sale under R. 17 is as per the rules of the Association, and if the sale has already been made under R. 15, it seems to me that R. 17 has no application. Nor do I think that R. 19 really assists the appellants. Under that rule the Directors of the Association have to settle the debts of a deceased member to other members of the Association out of the proceeds of the sale of the card and hand over the balance, if any, to the legal heirs of the deceased member. No doubt it may be said to be rather strange if the widow takes the proceeds of sale of the card for her own benefit if there are no debts of the deceased within the Association, but if there is any such debt even for quite a small amount, then the persons to take are to be the legal heirs. I think a good many strange and anomalous results may follow from the indifferent and confused drafting of these rules, and in any case there is nothing in R. 19 which gives the beneficiaries under the deceased's will a claim to the moneys. On the whole, without expressing either agreement or disagreement with some of the views expressed by the learned Judge in the Court below as to the general effect of these rules, in my opinion, on the facts of this case the widow cannot be made accountable for the proceeds of sale of this card to the plaintiffs, and that being so, the appeal fails and must be dismissed with costs. (The rest of the judgment is not material for the purposes of the report.)

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[1] Official Assignee, Bombay v. Shroff, A I R 1932 P C 186=137 I C 776=59 I A 318=56 Bom 374=34 Bom L R 1178 (P C).

Blackwell, J.—I agree, and have nothing to add.

V.B.B./R.K. *Appeal dismissed.*

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* A. I. R. 1937 Bombay 479

BEAUMONT, C. J. AND BLACKWELL, J.

Commissioner of Income-tax, Bombay Presidency, Sind and Aden

v.

Makanji Lalji.

Civil Ref. No. 14 of 1936, Decided on 25th March 1937, made by Commissioner of Income-tax, Bombay Presidency, Sind and Aden, under S. 66 (2), Income-tax Act.

*** Income-tax Act (1922), S. 3—Assessee, a Hindu joint family including widow of deceased co-parcener who has obtained decree for maintenance—Sum paid towards maintenance cannot be deducted from income of family.**

Where an assessee is a joint Hindu family including a deceased co-parcener's widow who has obtained a decree for maintenance, the decree does not amount to a severance and does not alter the character of the sum which she receives, which is still maintenance paid to her as a widow in a joint family. Therefore no deduction can be allowed from the income of the family in respect of sum paid towards the maintenance: *A I R 1933 P C 145, Disting.* [P 479 C 2; P 480 C 1]

K. McI. Kemp (Advocate General) — for the Commissioner, Income-tax.
C. K. Daphtary — for the Assessee.

Beaumont, C. J.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act. The question is whether certain allowances ought to be given to the assessee. The assessee is a Hindu undivided family. Originally the family consisted of a father and two brothers, the father died, and then one of the brothers named Mathuradas died leaving a widow Nambai. The other brother Kalianji then became the sole surviving co-parcener. He has got a son, so that the co-parcenary now consists of Kalianji and his son, and the widow of Mathuradas is a member of the joint family in her capacity as widow of a deceased co-parcener. She applied to the Court for maintenance, and by a decree of this Court she was allowed maintenance at the rate of Rs. 165 per month, and the question is whether that sum can be deducted from the assessable income. Now inasmuch as the assessee is the Hindu undivided joint family which includes this widow, it is difficult to see how any deduction can be allowed in respect of a share of the income going to one of the members of the joint family. Mr. Daphtary contends that the result of the decree in the widow's favour is really to take her out of the joint family qua maintenance. It is quite clear to my mind that the decree would not amount to a severance, and the widow would still have her rights, e. g. of adoption, as a member of the joint family, and I think there is no ground for the contention that the decree which fixes the amount of the maintenance alters the character of the sum which the widow receives, which is still maintenance paid to her as a widow in a joint family, although the amount is fixed by the decree.

Mr. Daphtary relies on the decision of the Privy Council in 35 Bom L R 811.[1] In that case there was a surviving male member of a joint family, and his step-mother had obtained a decree for maintenance. It appears from the report that the Advocate-General abandoned the contention that the appellant and his step-mother were members of an undivided Hindu family, and accepted the position that the appellant was liable to be assessed as an individual and in no other manner, and what the Privy Council held was that the assessee being an individual, the sum which he had to pay out of income to his step-mother never formed part of his income. It had been diverted to the step-mother before the income came to the hands of the assessee, and on that basis he was allowed a deduction in respect of the maintenance. But in this case the assessment being on a Hindu undivided family, it seems to me that the whole of the income of the Hindu undivided family is liable to assessment, and that it is impossible to deduct this sum payable to the widow of a deceased brother, who gets it in her capacity ultimately as a member of the joint family. I think therefore that the first question, "In the circumstances of the case, has the Income tax Officer correctly computed the income from house property at Rs. 4,767?" should be answered in the affirmative, and the second question, whether the assessee is entitled to any deduction from the above income of Rs. 4,767 in respect of Rs. 165 per mensem paid to Bai Nambai on account of maintenance under the consent decree, should be answered in the negative. Assessee to pay the costs of the Commissioner of Income-tax on the original side scale to be taxed by the Taxing Master—less Rs. 100.

Blackwell, J. — I agree, and have nothing to add.

D.S./R.K. *Answer accordingly.*

A. I. R. 1937 Bombay 480

BARLEE AND SEN, JJ.

Emperor

v.

Baburao Appa Lingayat — Accused.

Criminal Ref. No. 36 of 1937, Decided on 5th July 1937, made by Sess. Judge, West Khandesh, Dhulia.

Bombay (District) Tobacco Act (2 of 1933), S. 17—Tobacco merchant holding license for wholesale sale can sell tobacco wholesale either personally or through agents—Agent of such tobacco merchant selling bidis wholesale without hawker's license—Agent is not liable to prosecution under S. 17.

A tobacco merchant holding a license under the Bombay District Tobacco Act to sell tobacco wholesale throughout the Bombay Presidency and Sind excluding the city of Bombay is entitled to sell tobacco wholesale personally or through agents and servants at any place in the Bombay Presidency and is entitled to conduct his business by means of travelling agents. It is not necessary for a travelling agent of such a licensee to have a licence for hawking, though his procedure would come within the definition of hawking since the licence for wholesale sale is wide enough to cover wholesale hawking. [P 481 C 1, 2]

Where therefore the agent of such tobacco merchant sells bidis wholesale to the tobacco merchants of certain place within the province of the licence, the agent is not liable to prosecution under S. 17 of the Act. [P 481 C 2]

P. B. Shingne (*Govt. Pleader*) — for the Crown.

B. G. Padhye — for Accused.

Barlee, J.—The applicant has been convicted under the Bombay (District) Tobacco Act, 1933. He was a wholesale travelling agent of a wholesale tobacco merchant. He visited the town of Pimpalner by motor car and sold 8000 bidis wholesale to two local dealers. Later, it was found that there were 11000 bidis in his car. The learned Magistrate asked him whether he had a hawker's license for selling bidis. He replied in the negative. He denied that he had ever hawked bidis in the Nasik District. The learned Magistrate however convicted him and fined him Rs. 30 on the ground that he had admitted that he had sold 8000 bidis without a hawker's license, and had 11000 in his possession without a license for sale. We think that the learned Magistrate has erred, for a man may possess and sell bidis without a hawker's license. In fact a hawker's license is only one of several forms of licenses which are issued by Government for the sale of tobacco. We find from the Bombay Government Gazette of 28th November 1935 that licenses may be granted for the privilege of selling tobacco wholesale and for the privilege of selling tobacco retail, as well as for the privilege of hawking. 'Wholesale sale,' according to the Act means a sale of tobacco to traders for the purpose of trade. 'Hawker' means

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[1] Bejoy Singh Dudhuria v. Commissioner of Income-tax, Calcutta, A I R 1933 P C 145=143 I C 145=60 I A 196=60 Cal 1029=35 Bom L R 811 (P C).

> a person who goes from place to place or from house to house carrying or exposing for sale tobacco or exposing samples of tobacco to be afterwards delivered.

It is clear then that the two functions may overlap, for wholesale trade may be carried on, as it is widely carried on in many countries by means of travellers whose conduct comes within the definition of 'hawking'. To see whether the applicant could be rightly convicted, we have to look to the terms of his license. He was granted a license for the privilege of selling tobacco wholesale, throughout the whole of the Bombay Presidency and Sind, with the exception of the City of Bombay. The license gives the address of his principal shop and his branch shop and apparently any sale in any portion of the Bombay Presidency is covered by this license so long as the sale is wholesale. The learned Government Pleader asks us to decide that the wide powers given to the licensee by the first clause of the license are cut down by Cl. (3) and Cl. (4). Cl. 3 provides that a licensee shall have constantly fixed up in a conspicuous part of the front of his shops or places of business a signboard bearing in legible characters his name and other details; and Cl. (4) says that he may sell tobacco at places other than his regular shops or places of business without exhibiting such a signboard. The learned Government Pleader argues that the mention of shops or "places of business" precludes by implication sale at any place outside a shop or place of business. We are unable to accept this interpretation. It appears to us that Cl. (4) is an enabling section and not a restricting section and that, if we give a beneficial interpretation to this document, we must hold that the licensee was entitled to sell personally or through agents and servants wholesale at any place in the Bombay Presidency and that he was entitled to conduct his business by means of travellers.

This being so, we think that the sale at Pimpalner by the licensee's agent of bidis wholesale to the tobacco merchants was covered by his license. It was not necessary for the agent to have a license for hawking though his procedure would come within the definition of 'hawking,' since the license for wholesale sale was wide enough to cover wholesale hawking. In fact he could not have been given a license for hawking as a hawker is bound by the terms of his hawker's license to confine his sales to consumers only, that is he must necessarily sell retail. Accordingly we accept the reference made by the learned Sessions Judge and we set aside the conviction and sentence. The order of confiscation of 11000 bidis is also set aside.

K.B./R.K. *Conviction set aside.*

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* A. I. R. 1937 Bombay 481

FULL BENCH

BEAUMONT, C. J., SEN AND NORMAN, JJ.

Emperor

v.

Waman Ramji Patil.

Criminal Ref. No. 123 of 1937, Decided on 17th August 1937, made by Dist. Magistrate, West Khandesh.

*** Criminal P. C. (1898), S. 562 (1-A) — Admonition — Third Class Magistrate can exercise power of admonition :** *89 I C 1029 =A I R 1925 Bom 479, Overruled.*

The Proviso to sub-s. (1) of S. 562, Criminal P. C., does not extend to the powers conferred by sub-s. (1-A) and a Third Class Magistrate is therefore entitled to exercise the powers conferred by sub-s. (1-A) : *A I R 1925 All 644, Rel. on ; 89 I C 1029=A I R 1925 Bom 479*, **Overruled.** [P 483 C 1]

P. B. Shingne — for the Crown.

Beaumont, C. J. — This is a reference made by the District Magistrate of West Khandesh inviting the Court to set aside an order made by the Third Class Magistrate of Sindkheda under S. 562 (1-A), Criminal P. C., on the ground that the Magistrate had no power to make the order in view of the Proviso to S. 562 (1). The District Magistrate's view is no doubt based on the decision of this Court in 27 Bom L R 1019,[1] though the Allahabad High Court in 47 All 353[2] has taken the view that the Proviso to S. 562 (1) does not apply to S. 562 (1-A). When the matter came before a Division Bench consisting of myself and Norman, J., we thought that there was some doubt as to

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1. Emperor v. Ranchhod Harjivan, A I R 1925 Bom 479=89 I C 1029=26 Cr L J 1461=27 Bom L R 1019.
2. Murlidhar v. Mahbub Khan, A I R 1925 All 644=85 I C 848=47 All 353=26 Cr L J 624.

whether the decision in 27 Bom L R 1019[1] was right, and therefore the matter was referred to a Full Bench, and the Government Pleader has appeared and submitted his views to the Court. Now S. 562 (1) enables the Court to bind over a first offender, instead of sentencing him, in cases covered by the section. The section deals with an offence by any person not under 21 years of age punishable with not more than seven years imprisonment and with an offence by any person under 21 years of age or any woman which is punishable with death or transportation for life, where no previous conviction is proved against the offender, and in deciding whether to apply the sub-section or not, the Court is to have regard to the age, character or antecedents of the offender and to the circumstances in which the offence was committed. Then the Proviso directs that where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not especially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred "by this section" should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the First Class, or Sub-divisional Magistrate and the latter Magistrate can then take the appropriate action. Sub-s. (1-A) was added in the year 1923 and the Amending Act provides merely that after sub-s. (1) of S. 562, Criminal P. C. the following sub-section shall be inserted, and then sub-s. (1-A) is enacted. That sub-section enables the Court in the case of a person convicted of certain offences which are specified or any offence under the Penal Code punishable with not more than two years' imprisonment, where no previous conviction is proved, to discharge the accused with a warning, and the matters which the Court is to take into consideration in determining whether to exercise the powers conferred by the sub-section are the age, character, antecedents or physical or mental condition of the offender and the trivial nature of the offence or any extenuating circumstances. So that the Court must find that the offence is of a trivial nature or that there are extenuating circumstances.

Now it is to be noticed that there is nothing in the Amending Act to suggest that the Proviso to sub-s. (1) is to be read into the new sub-s. (1-A) and prima facie there seems to be no justification for taking the Proviso out of sub-s. (1) and reading it into sub-s. (1-A). It would have been very easy for the Legislature, if they had so desired, to have enacted that the Proviso to sub-s. (1) was to extend to sub-s. (1-A). This Court in 27 Bom L R 1019,[1] in holding that the Proviso did apply to sub-s. (1-A), relied on the fact that the Proviso referred to the powers conferred "by this section," an expression which the Court thought would include sub-s. (1-A) after its enactment. But when one has regard to the provisions of sub-s. (1) of S. 562, before the addition of sub-s. (1-A), it is apparent that the reference to "this section" in the Proviso was meant as a reference to "this sub-section" because the only other powers conferred by the section, namely those in sub-ss. (2) and (3) are powers conferred on the High Court or an Appellate Court, and it is obvious that the exercise of those powers could not be referred by a third class Magistrate to a First Class Magistrate.

So that on the language of the section, as it stands, I see no reason for reading the Proviso to S. 562 (1) into S. 562 (1-A). But in construing an Act of Parliament the Court must always have regard to the scheme of the Act as appearing from a perusal of the language of the whole enactment, and we have therefore to see whether it is necessary, in order to give effect to the scheme of the Act, that we should do a certain amount of violence to the language and read the Proviso to sub-s. (1) into sub-s. (1-A). In that connexion, the Government Pleader has referred us to the fact that sub-s. (1) to S. 562, as it originally existed, required the Court, in considering whether the powers in the sub-section should be applied, to have regard not only to the youth, character and antecedents of the offender (as at present), but to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed. In the year 1923, by Act 18, sub-s. (1) of S. 562 was re-enacted and the obligation on the Court to have regard to the trivial nature of the offence and to extenuating circumstances was omitted. Then, later in the same year, came the Amending Act adding sub-s. (1-A) which requires the Court, for the purposes of that sub-section, to have regard to the trivial nature of the offence or any extenuating circumstances. It seems to me therefore that the Legislature intended that the powers conferred by S. 562 (1) should be exercisable in cases of a serious nature which fell within the terms of the section, and not merely in cases of a trivial nature. On the other hand, the special power conferred by sub-s. (1-A) of releasing after due admonition was only to be exercised in cases of a trivial nature or where extenuating circumstances were found, and it may well be that the Legislature deliberately considered that in relation to the more serious powers under sub-s. (1) it was not right to entrust them to the lower grades of Magistrates, but that in relation to the much less serious powers under sub-s. (1-A) there was no danger in allowing the less experienced Magistrates to act upon them. In my opinion therefore both on the language of the section as it stands and on a consideration of the policy of the Legislature as appearing from the history of the enactment and the language of the section as a whole, it is clear that the Proviso to sub-s. (1) does not extend to the powers conferred by sub-s. (1-A) and that a Third Class Magistrate is therefore entitled to exercise the powers conferred by sub-s. (1-A). For these reasons the reference will be rejected.

Sen, J.—I agree and have nothing to add.

Norman, J.—I agree. I too have nothing to add.

B.D./R.K. *Reference rejected.*

A. I. R. 1937 Bombay 483

BROOMFIELD AND WASSOODEW, JJ.

Chunilal Bulakhidas Patel — Plaintiff — Appellant.

v.

Abdul Karim Shaikh Subhrati and *others* — Defendants — Respondents.

First Appeal No. 195 of 1933, Decided on 26th November 1936, against decision of First Class Sub-Judge, Ahmedabad, in Regular Civil Suit No. 692 of 1930.

(a) Transfer of Property Act (1882), S. 76—Liability of mortgagee in possession to account—Mortgagee is liable only in respect of that portion of which he had taken possession.

Upon a strictly technical view, the mortgagee in possession is liable to account and that liability in some respects might be regarded as absolute. But before that liability can be enforced in favour of the mortgagors, it must be proved that the mortgagee had received possession by virtue of the agreement. The mortgagee is only to be charged in respect of that part of which he had taken possession: *Soar* v. *Dalby, (1852) 15 Beav 156, Foll.* [P 486 C 2]

(b) Transfer of Property Act (1882), S. 76—Mortgagee's liability to account — Mortgagee is liable for what he has or without wilful default might have received from time of his taking possession—Burden is on mortgagor to establish case of wilful default.

The account usually directed against the mortgagee in possession, is of what he has, or without wilful default might have received from the time of his taking possession. His liability in the first instance extends in favour of those interested in the equity of redemption. Under that liability if a mortgagee employs an agent for collection of rent he must account for all the rents which were or could be realized by that agent. But the burden of proving that he made the most of the mortgaged property while in possession does not rest on the mortgagee as it is for the mortgagor to establish a case of wilful default. [P 486 C 2]

(c) Transfer of Property Act (1882), S. 76—Mortgagor remaining tenant of mortgagee under attornment clause—Mortgagee in such case is not mortgagee in possession.

Where the mortgagor is allowed to remain as a tenant of the mortgagee under what is called an attornment clause, in regard to such occupation the mortgagee does not stand in the position of a mortgagee in possession : *Ex parte Harrison : In re Betts, (1881) 18 Ch D 127, Ref.* [P 487 C 1]

(d) Transfer of Property Act (1882), S. 76—Liability of mortgagee in possession to account—Mortgagor causing obstruction to mortgagee's dealing with property—Mortgagee cannot be charged with wilful default.

Even the liability of mortgagee in possession, although absolute in the abstract, might be reduced or qualified by the obstruction of the mortgagor to make the best use of the property. The mortgagor who had caused obstruction to the mortgagee's dealing with the property cannot seek for penal enquiry and charge the mortgagee with wilful default: *Hughes* v. *Williams, (1806) 12 Ves 493, Ref.* [P 487 C 1, 2]

(e) Transfer of Property Act (1882), S. 76—Mortgagee is not always liable for gross estimated rent of property— In absence of proof that but for gross default he might have received full rent, he is liable to account only for what he has received.

The mortgagee is not always chargeable with the gross estimated rent of the property. The liability of the mortgagee for the omission to take drastic measures against the mortgagor who is the agent of the mortgagee for collection of rents must be limited by the circumstances of the case and he cannot be required to account for more than what he has received in the absence of proof that but for his gross default or mismanagement or fraud he might have received the full rent : *25 All 287* and *2 M I A 487, Rel. on.* [P 487 C 2]

G. N. Thakor and *B. G. Thakor* — for Appellant.

M. P. Amin (for Nos. 1 to 3), *H. H. Dalal* (for Nos. 4 & 5), *K. J. Khandalawalla, T. H. Nanavati, D. L. Dalal* (for Nos. 6 & 7) and *A. G. Desai* (for No. 9) — for Respondents.

Wassoodew, J. — This appeal arises from an action by a mortgagee to recover the mortgage money in the amount of Rs. 16,500 due on a mortgage of certain leasehold estate situated outside Sarangpur Darwaja in the Sheherkothada Sub-District of Ahmedabad. The mortgage deed was executed on 5th March 1927 by defendants 1, 4 and 5 of whom defendant 1 represented his own interest and that of his minor sons, defendants 2 and 3. Besides the said mortgagors the other parties to the suit were the heirs of the deceased surety, defendants 5 to 8, and the subsequent incumbrancer, defendant 9, who happened also to be the heir of the lessor. The principal advanced on the mortgage was Rs. 12,999 and the rate of interest agreed upon was thirteen and a half per cent. payable monthly. The deed provided that on failure to recover the interest regularly, compound interest was to be charged with monthly rests. In accordance with the terms of the deed, the mortgagee was to be placed in possession of the building consisting of thirty-two rooms at that time. The security was, however, expressly intended to cover twelve additional rooms which the mortgagors intended to construct and for which part of the debt was borrowed under the mortgage. The mortgagee in his turn agreed to apply the profits and rents of the property towards the payment of interest in the first instance and the balance towards the principal debt. Contemporaneously with the registration of the deed on 24th March 1927, two of the mortgagors, defendants 1 and 4, who were allowed to continue in occupation of part of the premises along with the other mortgagors, entered into an agreement with the mortgagee whereunder they undertook the collection of rents and to account for the same to the plaintiff. Soon after the registration of the deed, the tenants of the property attorned to the mortgagee by executing rent-notes in his favour. For the charges of collection, the mortgagors were remunerated at the rate of Rs. 10 per month. The effect of that agreement was that the duty of managing the estate and dealing with the tenants was not taken out of the hands of the principal mortgagors. The mortgagee alleged that the mortgagors who were thus entrusted with the work of collection committed breach of their agreement by failing to pay regularly the rent realized and account for the same to the plaintiff, that they did not pay him more than Rs. 146 in any one month, and that therefore the mortgagee was obliged to give them notice on 12th July 1929 not to make further recoveries or to enter on the premises. Having received no satisfactory reply, the mortgagee instituted the suit on 16th August 1930.

According to the plaintiff, the total sum paid to him during the three years before the suit was Rs. 3,683-8-0. The balance has therefore been claimed in this suit. It must be noted that upon the application of the mortgagee, the trial Court appointed a receiver and the properties are now in his charge. The mortgagee's claim was met by various pleas put forward by the mortgagors, such as that the full consideration mentioned in the deed was not received, that the suit was premature, that the agreement to collect rent was obtained by misrepresentation and that it was not acted upon, that the mortgagors had not collected any rent from the tenants in possession and that the twelve additional rooms constructed after the execution of the document were not intended to form part of the security. The heirs of the surety in their turn supported the mortgagors generally in their defence and maintained that the plaintiff was liable to account for all the monies recovered by the mortgagors on the footing that the latter were his agents. The holder of the subsequent encumbrance of the twelve rooms erected after the mortgage, who has attested the mortgage deed and whose prior encumbrance was paid off out of the advance received from the plaintiff, denied knowledge of the transaction and claimed priority for his amount maintaining that the subject matter of his charge was not covered by the plaintiff's security.

The principal defences of the parties were disallowed by the learned trial Judge, but the material plea which prevailed with him was that the mortgagee was guilty of wilful default inasmuch as he, being a mortgagee in possession--the mortgagors being no better than his agents for collection—was liable to account for all the rents that were or could be recovered from the tenants and not merely for the rents which were paid to him by the mortgagors. On the footing of the mortgagee's wilful default, accounts were ordered to be taken of the gross rent realisable from the premises that existed when the mortgage was executed as well as the twelve additional rooms subsequently constructed and which, according to the defendants themselves, were never delivered into the possession of the mortgagee, and a decree for Rs. 8,214-7-3 with interest on the amount found due and costs on the amount due at the date of the suit was passed against the mortgagors and the surety personally and against the mortgaged property. The subsequent incumbrancer, defendant 9, was also held liable personally for that amount and the priority claimed for his advance was disallowed. Against that decree, the mortgagee has appealed. The heirs of the surety and the subsequent incumbrancer have acquiesced in it.

The only question of substance is whether the mortgagee in the circumstances is accountable for the profits of the mortgaged property on the footing of wilful default. In the consideration of that question it is necessary to state our conclusions on evidence in regard to the contentions of the respective parties relating to the possession of the property. There can be no doubt upon the record that the mortgagee, although entitled to possession by virtue of the terms of the deed, has allowed the mortgagors (defendants 1 and 4) to occupy a portion of the premises and to collect rent for him as his servants or agents. That is the effect of the agreement—Ex. 62. The defences of defendants 1 and 4, which are mutually inconsistent, are clearly disingenuous. Neither of them has honestly admitted that he received rents for the plaintiff in terms of the agreement. The learned counsel for defendant 1 did not attempt to sustain his plea of misrepresentation as nullifying the agreement. In his examination, defendant 1 was constrained to admit that he collected rent on behalf of the plaintiff, passed receipts and handed over the collections to the latter. Defendant 4 denied that he dealt with the tenants or recovered rents. But he did not enter the witness-box to substantiate his written defence. It is important to note that in regard to the amount actually collected and handed over to the plaintiff, the latter's statement has not been contradicted. The plaintiff says that he received Rs. 3,683-8-0 from defendant 1 during the three years prior to the suit and we do not see any reason to discredit that statement. It is supported by the diaries of the plaintiff which appear to be regularly written and in which balances have been struck from day to day. The plaintiff is corroborated by the acknowledgments signed by defendant 1 in November 1928 (Ex. 146) confirming the plaintiff's statement in regard to the actual amount handed over to him at the end of the second year. That evidence of actual receipts from the property mortgaged is all that is available from the plaintiff's side and it is reasonable to suppose that no other evidence with regard to the details of recoveries could be procured by him, having regard to the exclusive management of the premises by defendants 1 and 4.

Comment has been made on the mortgagee's failure to maintain proper accounts, notwithstanding the fact that the mortgagors themselves agreed to be in management. It is pointed out that under the provisions of S. 76, T. P. Act, the mortgagee's account must show not only what the mortgagee has actually realized from his agents but also from what portions of the mortgaged property, in what terms or periods, with a statement showing necessary deductions for vacancies, and the net profits available on actual realizations in liquidation of the mortgage debt. There could have been considerable force in that suggestion if we were dealing with a mortgagee in actual possession independently of the mortgagors' intercession. There were in all about thirty-two tenements occupied by tenants through whom rent-notes were procured by the mortgagors in favour of the plaintiff for a period of one month : *vide* Exs. 65 to 95. In the view we take of the evidence, the rents were directly recovered by defendants 1 and 4 who were left to deal with the tenants. In ordinary circumstances therefore, the persons best cognizant of the state of recoveries and vacancies in respect of those tenements would be the mortgagors themselves. There is no evidence tendered that all the rents were recovered from the occupants of the rooms. Defendant 1 has admitted that there were some changes in some tenants, but there was no suggestion that the plaintiff had a hand in replacing them. It is therefore difficult to conceive how the plaintiff could give any account regarding the number of occupants of the premises, the rent actually realized and what loss was suffered on account of vacancies. As I have stated above, that was all within the special knowledge of defendants 1 and 4, and inasmuch as defendant 1 has given evasive replies, and defendant 4 has abstained from supporting his case, there is every justification for drawing an adverse inference against them. It is in our opinion unreasonable to assume, as the lower Court has done, that all the rooms continued to be occupied or that the tenants regularly paid the rents. The irresistible inference from all the facts and circumstances is that in all probability defendants 1 and 4 recovered the rents and paid taxes and portion of the lessors' dues. There is no direct or circumstantial proof that the plaintiff had a hand in the actual recoveries from the tenants. Although technically the plaintiff was the mortgagee in possession and could be said to have constructively received possession from his mortgagors, he could not and did not interfere with the management till November 1929. That is our conclusion in regard to the position of the plaintiff relating to the thirty-two rooms which existed at the date of the mortgage.

Our finding of fact upon the evidence with regard to the twelve rooms subsequently constructed is that the plaintiff was never in possession either directly or through defendants 1 and 4. It is neither suggested nor proved that they were delivered to the plaintiff. The contents of the plaint do not necessarily imply that the plaintiff took possession of those rooms. The reference in that respect is undoubtedly in connexion with the contention that those twelve rooms were not part of the security under the possessory mortgage. The plaintiff's case could reasonably be supported upon the express terms of the deed and under the provisions of S. 70, T. P. Act. It does not follow that because of that reference in the plaint to the defendants' contention, the mortgagee actually received possession. It is to be noted that the agreement of defendants 1 and 4 makes no reference to the collection of rent of those premises and there is no reason to infer that they were authorized to collect rent by the plaintiff. The written defence and the execution of the subsequent possessory mortgage necessarily militate against the assumption of the mortgagee's possession. It is therefore curious to find that the lower Court by its order of 24th March 1933, *vide* Ex. 168, made the plaintiff liable to account for the gross rent of those rooms also. As I have observed, upon a strictly technical view, the mortgagee in possession is liable to account and that liability in some respects might be regarded as absolute. But before that liability can be enforced in favour of the mortgagors, it must be proved that the mortgagee had received possession by virtue of the agreement. That is a matter of proof and not presumption. In (1852) 15 Beav 156,[1] the Master of the Rolls expressed the opinion that the mortgagee was only to be charged in respect of that part of which he had taken possession. Obviously therefore the order of the lower Court in regard to those 12 rooms cannot be supported.

The main dispute is in regard to the basis upon which the mortgagee should be made to account to the mortgagors for the profits of the 32 rooms mortgaged. It has been well recognized that the account usually directed against the mortgagee in possession is of what he has, or without wilful default, might have received from the time of his taking possession. Under S. 76 (b), T. P. Act, he must use his best endeavours to collect rents and profits. Prima facie the plaintiff, when he took the rent-notes from his tenants, technically rendered himself liable to account for the rents which he had contracted to receive and it cannot be denied that the law required him to be diligent in realizing the rents from them in order that the burden of the debt may be reduced. His liability in the first instance extends in favour of those interested in the equity of redemption. It has been pointed out in numerous decisions of our Courts that under that liability if a mortgagee employs an agent for collection of rents, he must account for all the rents which were or could be realized by that agent. But the burden of proving that he made the most of the mortgaged property while in possession does not rest on the mortgagee as it is for the mortgagor to establish a case of wilful default: *see* the cases cited in the foot-note on the subject in Ghose's Law of Mortgage, 4th Edn., p. 532.

The question therefore is whether the mortgagee, having regard to the fact that the mortgagors have succeeded in keeping the mortgagee out of the management of the property, by themselves remaining in possession of the premises either under an attornment clause or under an agreement, such as we have here, under which the mortgagors are allowed to deal with the tenants, could be made liable to account as an ordinary mortgagee in possession who has been managing the estate through his private agents. There have been cases where the mortgagor is allowed to remain as a tenant of the mortgagee under what is called an attornment clause and it has been held that in regard to such occupation the mortgagee does not stand in the position of a mortgagee in possession: *see* (1881) 18 Ch D 127.[2] The position is thus summed up under the heading "Attornment by Mortgagor" in Fisher and Lightwood's Law of Mortgage, 7th Edn., page 721:

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[1] **Soar v. Dalby, (1852) 15 Beav 156.**

> It has been said that the attornment of the mortgagor, if in actual occupation, as tenant to the mortgagee—although only by virtue of an attornment clause in the mortgage deed—makes the mortgagee liable as mortgagee in possession to subsequent incumbrancers; but that view has not been accepted, and the ordinary relation of mortgagor and mortgagee continues. In any case the mortgagee is not liable on this ground to account as mortgagee in possession to the mortgagor.

The position of defendants 1 and 4 is analogous to that of mortgagors occupying, under an attornment clause, a part of the premises for which they are admittedly liable to pay rent. The mortgagors also offered and undertook to make recoveries. There was a representation by the surety that having regard to the recalcitrancy of the tenants, the rents could not be recovered without employing the mortgagors for the purpose. They either failed to make recoveries, or after having made the same, refused to account for them to the mortgagee. And yet it is claimed on their behalf that accounts should be rendered by the mortgagee on the footing that what they (the mortgagors) did recover or might have recovered could properly have been recovered by the mortgagee if he were diligent. It is suggested however that at any rate the conduct of defendants 1 and 4 ought not to prejudice the interests of defendants 2, 3 and 5 who were not parties to the arrangement and who did not participate in the alleged misappropriation of the co-mortgagors. Even the liability of a mortgagee in possession, although absolute in the abstract, might be reduced or qualified by the obstruction of the mortgagor to make the best use of the property. In (1806) 12 Ves 493[3] it was pointed out that if the mortgagor knows that his estate is underlet, he ought to give notice to the mortgagee and "afford his advice and aid" for the purpose of making the estate as productive as possible. In other words, the mortgagor cannot keep quiet and seek afterwards by way of "penal inquiry" to charge the mortgagee with the effect of his own negligence. A fortiori the mortgagor who had caused obstruction to the mortgagee's dealing with the property, as the reply to the notice shows, cannot seek for penal inquiry and charge the mortgagee with wilful default.

The mortgagee is not always chargeable with the gross estimated rent of the property: *see* 25 All 287.[4] According to the rent-notes, the total rent realizable was Rs. 232 per month, but there is no evidence that the whole amount could be realized. It is true that the plaintiff charged the defendants with misappropriation of part of the rents and could have taken steps to dismiss them. But having regard to the circumstances and the representation made to him by the surety, who was interested in the proper recoveries of the plaintiff's property, those recoveries would be impossible without the mortgagor's co-operation. It was therefore a matter of conjecture and uncertainty whether the dismissal would have entailed improvement in the position. The liability of the mortgagee for the omission to take drastic measures against the mortgagor must be limited by the circumstances of the case and he cannot be required to account for more than what he has received in the absence of proof that but for his gross default or mismanagement or fraud he might have received the full rent. In 2 M I A 487[5], the mortgagee under his agreement was entitled to recover rents through a mehta appointed by the mortgagee but paid by the mortgagor. The mehta had allowed the mortgagor to receive the rent directly. On the question whether the mortgagee was liable on the footing of wilful default in respect of the sum paid to the mortgagor, their Lordships observed as follows (p. 500):

> . . . the question will be, in what way the mortgagee's rights are affected by this conduct, and that will depend first upon the construction of the instrument itself. If this is a binding con-

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[2] Ex parte Harrison: In re Betts, (1881) 18 Ch D 127=50 LJCh 832=45 LT 290=30WR 38.

[3] Hughes v. Williams, (1806) 12 Ves 493=8 R R 364.

[4] Banarsi Prasad v. Ram Narain, (1903) 25 All 287=30 I A 66=8 Sar 447 (P C).

[5] Jugjeewun Das Keeka Shah v. Ramdas Brijbookun Das, (1841) 2 M I A 487=6 W R P C 10 (P C).

> tract, binding between him and the mortgagors, binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his mehta was in possession. But their Lordships are of opinion that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an English mortgagee chooses to forgo the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incumbrancer came in, and he had notice of that claim.

That is consistent with (1881) 18 Ch D 127.[2] The Court will not penalise a mortgagee if the mortgagor has contributed effectively and successfully towards the mortgagee's failure to discharge his duty as a mortgagee in possession. The cases cited before us such as 8 Luck 40[6] and A I R 1929 All 260[7] are distinguishable on facts. It is possible to conceive of cases where the mortgagee without any special agreement has connived at the management of the mortgagor. In that case it is reasonable to make him liable. It was observed in (1886) 32 Ch D 53[8] that the fact that the mortgagees were in receipt of the rents and profits of the mortgaged estate did not necessarily make them chargeable as mortgagees in possession; and that the question whether they were mortgagees in possession depended upon whether they had taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants. In the view we take of the evidence, the burden of proof of wilful default has not been satisfactorily discharged by the mortgagors. There is no doubt therefore that the mortgagee is accountable to defendants 1 and 4 for what he has actually received from them. The case of the co-mortgagors (defendants 2, 3 and 5) does not, in my opinion, stand on a different footing. It is sufficient to say that defendant 1 represented his two minor sons, defendants 2 and 3, in the suit and they submitted a common defence. The only lessees named in the lease of this estate are defendants 1 and 4. Therefore the interests if any of defendants 2 and 3 would be derived through their father defendant 1 and their brother defendant 4 who were the principal persons to bring about this transaction. It is also necessary to note that defendant 1 has claimed the property as his own. Having regard to that relationship of the minors and the nature of their interest, it is not unreasonable to suppose that the managing co-mortgagors represented them also. Therefore there is no reason to extend or to enlarge the liability of the mortgagee in their favour.

It has been contended on behalf of the heirs of the surety that at least so far as he is concerned, the liability should be enlarged and the mortgagee made strictly accountable on the principle of wilful default. The learned counsel went to the length of saying that there was variance of the contract without the surety's consent which ipso facto discharged the latter. There is no plea of discharge in the written defence and no issue directed to the point. The surety has been held liable in the Court below on the footing that he was bound by the contract. Against that finding, no appeal has been presented and no cross-objections urged. It is therefore difficult to say how the question of the surety's discharge can be raised for the first time in appeal. But apart from that difficulty, it is clear that there is no variance such as the one urged. It is necessary in the consideration of the argument to refer to the precise terms of the mortgage deed containing the indemnity bond to protect the interests of the mortgagee. After the description of the property, the deed recites the mortgagee's undertaking to apply the income towards the payment of annual interest and the balance if any towards the principal. Then follows the undermentioned clause in the deed:

> In case the rent in respect of the rooms mortgaged with possession be realized or not realized, or if the rent is realized but the tenants fail to pay the same or if the rooms remain vacant, in all these matters we and our heirs and representatives are to be responsible for the same, but so far as you are concerned, you are to give credit to us for as much rent as you may receive.

Assuming, so far as the mortgagors are concerned, that the mortgagee could not contract out of his statutory liability by virtue of that clause, that clause would

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6. Saeed Ahmad Khan v. Pratab Narain Singh, A I R 1932 Oudh 255=139 I C 64=8 Luck 40=9 O W N 253.

7. Mt. Ratan Dei Kumar v. Sher Singh, A I R 1929 All 260=114 I C 876=1929 A L J 217.

8. Noyes v. Pollock, (1886) 32 Ch D 53=55 L J Ch 513=54 L T 473=34 W R 383.

govern the contract of indemnity. Its existence was present to the mind of the surety when the deed was executed. Therefore, the surety cannot contend that the mortgagee under the deed was not accountable only for the net rents realized by him. The surety, upon the evidence which we accept, brought about the agreement with the mortgagee and he cannot be heard to say that because the mortgagee had suffered the mortgagors to collect the rents and to remain in occupation, there was a variance of the contract which released him from liability. It is to be noted that the surety himself had employed defendant 1 to collect his rent and according to him he was the best person to do so. It is therefore strange to notice that he should complain against the plaintiff's action. Nor can it be urged that the surety should be discharged because the arrangement between the plaintiff and the mortgagors affected the fund upon which the surety had a right to rely. Upon the facts it is possible to hold that there was no deterioration of the mortgaged property by any wilful neglect on the part of the mortgagee. It is possible to conceive that when the mortgagors offered Rs. 146 out of the gross rental of Rs. 232 per month, the mortgagee believed that the balance would possibly be utilised in some lawful manner to pay taxes or rent. I have already dealt with the difficulty of maintaining any fuller accounts than those adduced and I think in the circumstances the plaintiff could not be expected to do anything better. There is no equity in favour of the surety.

Then there remains the question of the subsequent incumbrancer. It may be noted that although no relief was claimed against him, the lower Court has passed a personal decree against him as well as against defendants 1 to 7. No appeal has been preferred against that part of the decree. The learned counsel for the appellant has candidly stated that he does not propose to execute the decree against defendant 9. The priority claimed by him in the lower Court has been disallowed. All that is urged on his behalf is that inasmuch as the plaintiff has neglected to recover the rents through the mortgagors, he cannot fall back on the entire security to the prejudice of the second incumbrancer. As I have already observed, that encumbrance relates to the twelve rooms subsequently erected, and inasmuch as there was no delivery of possession to the mortgagee, there was no question of the latter incurring a liability on the footing of wilful default to the second incumbrancer. It is suggested that when directing the sale of the property for satisfying the debt, the subject matter of the second encumbrance should not be sold until and unless the other portion of the security has been found insufficient to meet the claim awarded to the plaintiff. The lower Court's order as it stands makes provision for such a contingency. If it is practicable and feasible to sell the other part of the property separately, the lower Court will be able to protect the interests of the subsequent incumbrancer. We therefore propose to make no alteration in the order of the lower Court in that respect.

As a result of our finding, the lower Court's decree will be modified in the following manner: that in lieu of the amount found due by the lower Court another shall be substituted after taking a fresh account in which the plaintiff shall be debited with the actual amount of the rent realized by him from the property mortgaged according to his statement, it being understood that the account shall not be re-opened except where necessary in consequence of this order in order to make an adjustment of interest upon the amount of actual realization of rent. The question of the mortgagee's liability for being debited with any amount other than that which has already been debited to him besides rent in the accounts taken in the lower Court, shall not be raised upon this remand. It has been suggested to us that the account can best be taken in the trial Court. We, therefore, remand this case to the lower Court for a finding on the following issue: "What amount is due to the plaintiff on the mortgage on the basis of the above judgment and direction?" The finding on the above issue shall be returned to us within one month after the record is received in the lower Court. On the question of costs, we are satisfied after hearing arguments that there is no reason to restrict the plaintiff's claim for costs on the amount due at the date of the suit. He shall get his costs on the amount awarded to him. A formal order in that respect will be passed when the finding is received.

Broomfield, J.—I agree.

D.S./R.K. *Appeal allowed.*

* A. I. R. 1937 Bombay 490

BEAUMONT, C. J.

Babaldas Trikamdas & Co.—Plaintiff—Applicant.

v.

Ajmir Ramsunder — Defendant — Opponent.

Civil Revn. Appln. No. 347 of 1936, Decided on 26th February 1937, against order of Full Court of Presidency Court of Small Causes, Bombay.

*** Presidency Small Cause Courts Act (1882), S. 19, Cl. (s) — Suit by decree-holder under O. 21, R. 63, Civil P. C. is not suit for declaration—Small Cause Court can entertain such suit.**

A suit by a decree-holder under O. 21, R. 63, Civil P. C. is no doubt a suit to establish a right and not to establish title to property; but the right which the plaintiff seeks to establish is a right to attach the judgment-debtor's property and not merely a right to a declaration that he is entitled to attach the judgment-debtor's property. The Small Cause Court therefore has jurisdiction to entertain such suit. [P 491 C 1]

Pherozshah H. Dalal—for Applicant.

G. N. Thakor, B. G. Thakor and *S. R. Mehta*—for Opponent.

Order.—This is a revision application against an order made by the Full Court of the Bombay Small Cause Court, and the question raised is as to the jurisdiction of the Small Cause Court to entertain a suit by a decree-holder to establish his right to the attachment of property under O. 21, R. 63, Civil P. C. The material facts are that the plaintiff obtained a decree for Rs. 500 odd, and in January 1936 in execution of that decree he attached fifteen buffaloes alleged to belong to the judgment-debtor. The present opponent made a claim to those buffaloes under R. 58 of O. 21. That claim was inquired into by one of the learned Judges of the Small Cause Court and was eventually allowed, and under R. 60 an order was made setting aside the attachment. The plaintiff then brought a suit in the Small Cause Court under R. 63, which is in these terms:

> *63.* Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

The learned Judge, before whom the suit came, entertained it and made a decree, setting aside the summary order made under R. 60, and directing attachment to continue and immediate execution to issue. The matter was then taken before the Full Court, who held that the Small Cause Court had no jurisdiction to entertain the suit, because it was a suit for a declaratory order, although I may point out that the learned Judge who tried the suit had made no declaration. General jurisdiction is conferred on the Small Cause Court by S. 18, Presidency Small Cause Courts Act, 1882, and that jurisdiction extends to suits of a civil nature when the amount or the value of the subject matter does not exceed Rs. 2,000. As the decree in this case was for much less than Rs. 2,000, and nobody suggests that fifteen buffaloes are worth Rs. 2,000, there is no doubt that from the point of view of pecuniary limit the Court would have jurisdiction but the Full Court considered that the Court had no jurisdiction, because under S. 19, Cl. (s), suits for declaratory decrees are excluded from the jurisdiction of the Court. If the Full Court is right in thinking that this suit is in its nature a suit for a declaratory decree, then no doubt the Court had no jurisdiction. The question really is, whether the suit is a suit for a declaratory decree. Now, the actual words of R. 63, as I have pointed out, are ". . . . a suit to establish a right which he claims . . . ." All suits are suits to establish rights of one sort or another, and obviously the right may or may not be a right to a declaration. The words of the Rule are on that point completely neutral. It may well be that an order might be framed under Rule 63 in a declaratory form,—an order, declaring that the plaintiff is entitled to attach the property of the judgment-debtor, would probably satisfy the plaintiff's requirements; but, on the other hand, it seems to me plain that the Court can make an order which is not in the form of a declaration. An order in this form "the Court being of opinion that the judgment-debtor is entitled to the property sought to be attached directs, notwithstanding the order already made under Rule 60, the attachment of the plaintiff to continue," would in my opinion be a proper and effective order which does not involve in point of form any declaration. I think, however, that one has to look at the substance of the order sought for under Rule 63 without regard to the particular form in which it may be expressed.

Now, it has been held in various cases, both in this Court and in other Courts, that a suit by the claimant under Rule 63 is a suit to establish a right to the claimant's property which is sought to be attached as belonging to the judgment-debtor, and is not a suit for a declaration. But it is argued that inasmuch as a decree-holder claims no title to the property but a mere right to attach it, therefore a suit by him under Rule 63 is a suit to establish a right other than a right to property, and is therefore of a declaratory nature. But I am unable to agree with that view. It is no doubt a suit to establish a right and not to establish title to property, but the right which the plaintiff seeks to establish is a right to attach the judgment-debtor's property and not merely a right to a declaration that he is entitled to attach the judgment-debtor's property. The plaintiff seeks a substantive right and not a mere right to a declaration. Cases arising under the former, Small Cause Courts Act, seem to me to have no application, because that Act defined the particular classes of cases in which the Court had jurisdiction. I may point out that the Privy Council in 35 Cal 202[1] held that the essence of a suit under the then S. 283 of the Code, corresponding to the present Rule 63, was to set aside an order. That opinion was expressed in reference to a point arising under the Court-fees Act, and it shows that their Lordships considered that the essence of the suit under Rule 63 was to set aside an order and not merely to ask for a declaration. My own view is that the proper form of order in such a suit as this is not to set aside the order made under Rule 60, which the Court had jurisdiction to make, but to direct that, notwithstanding the order previously made under Rule 60, the attachment is to continue. That is substantially the order which the learned trial Judge made. In my opinion therefore, the Court had jurisdiction to entertain the suit, and the order of the trial Court should be restored. The applicant is entitled to costs throughout.

D.S./R.K. *Revision allowed.*

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[1] Phul Kumari v. Ghanshyam Misra, (1907) 35 Cal 202=35 I A 22=7 C L J 36=12 C W N 169 (P C).

A. I. R. 1937 Bombay 491

BEAUMONT, C. J. AND N. J. WADIA, J.

Parvateppa Mallappa Hubli

v.

Hubli Municipality.

First Appeal No. 193 of 1932, Decided on 3rd February 1937.

Bombay Municipal Boroughs Act (18 of 1925), S. 206—S. 206 gives protection for any act whether done bona fide or mala fide — Suit for malicious prosecution on failure of prosecution by Municipality for infringement of provisions of Act is governed by S. 206 and not by Art. 2 or Art. 23, Limitation Act.

The effect of the protective words "anything done or purporting to have been done in pursuance of the Act" in S. 206, Bombay Municipal Boroughs Act, is to protect the Municipality or its officers in respect of anything done or purporting to have been done in pursuance of the Act, whether such action is "bona fide" or "mala fide". [P 492 C 2]

A suit therefore for malicious prosecution against the Municipality on the acquittal of a person who has been prosecuted for alleged infringement of some provision is governed by S. 206 of the Act and must be brought within six months of the Act complained of and is not governed by Art. 2 or Art. 23, Lim. Act : *25 Bom 387* and *A I R 1925 Rang 311, Disting.* [P 491 C 2; P 492 C 2; P 493 C 1]

S. A. Desai and *B. Moropanth* — for Appellant.

A. G. Desai — for Respondent.

Beaumont, C. J. — This is an appeal from a decision of the First Class Subordinate Judge of Dharwar. The plaintiff had been prosecuted for an offence under S. 152, Bombay Municipal Boroughs Act, 1925, and was acquitted. He brought a suit for malicious prosecution against the Municipality of Hubli. The learned Judge held on a preliminary issue that the suit was time-barred. The learned Judge held that the section governing the case is S. 206, Bombay Municipal Boroughs Act, and it seems to me clear that if that section on its wording covers a case of malicious prosecution, then that is a specific section which covers this case on the point of limitation, to the exclusion of either Art. 2 or Art. 23 of the Schedule to the Limitation Act. That seems to me to be clear from the provisions of S. 29, Lim. Act. The real question is whether a suit for malicious prosecution, that is a suit instituted against the Municipality for acts not done bona fide under the powers contained in the Act falls within the provisions of S. 206. S. 206 is in these terms :

> No person shall commence any suit against any municipality or against any officer or servant of a municipality or a person acting under the orders of a municipality for anything done or purporting to have been done in pursuance of this Act, without giving to such municipality, officer, servant or person two months' previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of . . . . .

There is no doubt that the learned Judge was right in holding that this suit was instituted after six months from the date of the act complained of, i. e. after the acquittal of the accused. Mr. S. A. Desai for the appellant contends that S. 206 does not apply to actions of the Municipality or its officers which are done mala fide. He argues that the Municipality commenced the prosecution for an infringement of the Act, well knowing that there had been no infringement, and that in so doing, the Municipality cannot be said to be acting or purporting to act in pursuance of the Act ; and for that proposition he relies on certain authorities. He relies, first, on a decision of this Court in 25 Bom 387.[1] But in that case the relevant words of the statute which the Court had to construe were in respect of an act done in pursuance or execution or intended execution of the Act, and the Court held that an action which was not bona fide was not done in execution or intended execution of the Act. That may well be so, but the relevant words in the Bombay Municipal Boroughs Act are "purporting to have been done in pursuance of the Act". The relevant words of the statute under consideration in the English case, (1883) 11 Q B D 299,[2] also deal with acts done in execution or intended execution of the Act and therefore the English case is subject to the same comment as 25 Bom 387.[1] The same comment also applies to the English case, (1871) 6 Q B 724,[3] which was referred to in 25 Bom 387.[1] There the relevant words were "for anything done in pursuance of or under the authority of this Act". The other case on which Mr. S. A. Desai relies is 3 Rang 268.[4] There the Court was discussing the meaning of Art. 2 of the Schedule to the Limitation Act, which is in these terms :

> For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India.

I agree that the words "alleged to be in pursuance of any enactment" are very much the same as "purporting to be done in pursuance of the enactment," and no doubt the Rangoon Court held that Art. 2 did not apply to an action for malicious prosecution. But the Court there purported to follow the decision of this Court in 25 Bom 387,[1] and did not notice that the Act with which the Court was dealing is differently worded from Art. 2 of the Schedule to the Limitation Act. It may, I think, be said that the general tendency of the Courts has been to construe provisions protecting persons from the consequences of acts done under a particular Act so as to limit those provisions to acts of a bona fide character, and not to extend them to acts done mala fide. But no authority has laid it down, or could have laid it down, that if the Legislature expresses itself in sufficiently clear language, it cannot afford protection to acts done mala fide. Now here the protective words cover "anything done or purporting to have been done in pursuance of the Act".

The effect of the section is therefore to protect the Municipality or its officers in respect of anything done or purporting to have been done in pursuance of the Act. It seems to me that the words "purporting to have been done" must bear their natural meaning. If a prosecution is launched for an alleged infringement of some provisions in the Act, then the prosecution purports to be in pursuance of the Act, whether the action is a bona fide one or not. I see no reason here why we should not give to the language, which the Legislature has used, its natural meaning. It may well be that the terms of S. 206, Bombay Municipal Boroughs Act of 1925, are deliberately expressed in wider language than was used in the statute with which the Court had to deal in 25 Bom 387.[1] It is to be noticed that the protection afforded by S. 206 is not an absolute protection. It does not bar suits, but only requires that they must be brought within six months. Even if the section does not apply to an action for malicious prosecution, such an action would fall under the general provisions of Art. 23, Lim. Act, and would have to be brought within one year. There seems to me nothing extraordinary in the Legislature providing that in a normal case an action for malicious prosecution must be brought within a year from the cause of action, but that an action against a Municipality must be brought within six months. In my opinion therefore the learned Judge was right in holding that whatever the plaintiff might prove on the merits of his case,

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1. Ranchordas Moorarji v. Municipal Commissioner for the City of Bombay, (1901) 25 Bom 387=3 Bom L R 158.
2. Foat v. Margate Corporation, (1883) 11 Q B D 299=52 L J Q B 711=47 J P 535.
3. Selmes v. Judge, (1871) 6 Q B 724.
4. Maung Kyaw Nyun v. Ma-ubin Municipality, A I R 1925 Rang 311=89 I C 861=3 Rang 268=4 Bur L J 139.

the suit was barred by limitation. The appeal must be dismissed with costs.

N. J. Wadia, J.—I agree.

A.L./R.K. *Appeal dismissed.*

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* A. I. R. 1937 Bombay 493

BEAUMONT, C. J. AND BLACKWELL, J.

Commissioner of Income-tax, Bombay Presidency, Sind and Aden

v.

Vishvanath Bhaskar Sathe.

Civil Ref. No. 12 of 1936, Decided on 23rd March 1937, made by Commissioner of Income-tax, Bombay Presidency, Sind and Aden.

*** Income-tax Act (1922), S. 10 (2) (iv) and (vi) — Word "used" in sub-cl. (iv) embraces passive as well as active user — Owner of ginning factory as member of pool required to keep machinery in good condition and working order to entitle him to share of profits — Machinery not actually employed during year of assessment — Machinery so kept ready is machinery used for purposes of business — Assessee is entitled to depreciation allowance under S. 10 (2) (vi).**

In view of S. 10 (2), sub-cls. (iv) and (vi), Income-tax Act, the property in respect of which depreciation is allowed must have been used by him for the purposes of his business. The word "used" in S. 10 (2) (iv) of the Act is capable of being given a wider meaning and it embraces passive as well as active user. Machinery which is kept idle may well depreciate. The ultimate test is whether without the particular user of the machinery the profits made by the assessee could have been made. [P 494 C 1]

Where an assessee, the owner of a ginning factory, by virtue of being a member of a pool is under an obligation to keep his gin and machinery thereof in good repair and condition and in working order at his own expense to entitle him to a share of profits made by the pool, and the machinery is so kept ready for use at any moment by him, the machinery can be said to be used by him for the purposes of the business which earns the profits, although it is not actually worked during the year of assessment. The assessee in such a case is entitled to the allowance on account of depreciation under S. 10 (2) (vi) of the Act: *5 I T C 257*; *3 I T C 73* and *8 I T C 410*, *Disting.* [P 493 C 2; P 494 C 1]

K. McI. Kemp (Advocate-General) — for I. T. Commissioner.

G. M. Joshi — for the Assessee.

Beaumont, C. J. — This is a reference made by the Income-tax Commissioner under S. 66 (2), Income-tax Act, which raises a question lying in a very small compass but one easier to state than to answer. It appears that the assessee, during the year of assessment, which was the year ending 31st March 1936 owned a ginning factory in Dhulia and he was a member with owners of other ginning factories of a pool. The Commissioner finds as a fact that during the year of assessment the factory of the assessee was not actually employed in the work of ginning; and presumably it was not so employed under some arrangement made by the pool—although I have not been referred to any clause of the pool agreement under which the factories of some of the members can be closed. But under clause 16 of the agreement it is provided as follows:

> In order to entitle the parties hereto to their respective shares in the said pool as mentioned in clause 7 hereof, they shall keep and maintain at Dhulia during the continuance of this agreement his or their gins and other working plant with the necessary machinery appertaining thereto as they exist at the date of this agreement and shall at all times at their own expense keep the same in good repair and condition and in working order and shall not during the said term remove or permit to be removed any of such gins or machinery at Dhulia to any other place or places; Provided always that any of the parties hereto shall be at liberty if they so desire to close his or their factory or factories and dispense with his or their staff and workmen for any period during the contract period retaining nevertheless his or their right to receive his or their share in the said pool.

That clause appears to impose on the assessee the obligation during the year of assessment at his own expense to keep his gins and other working plant and machinery in good repair and condition and in working order; and it is on account of that obligation that he becomes entitled to a share of the profits made by the pool. The question is whether in those circumstances the Income-tax Officer was correct in deciding that the assessee was not entitled to any allowance on account of depreciation of the machinery in his cotton gin. Now depreciation is allowed under S. 10 (2) (vi), Income-tax Act, "in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee" at the rates therein specified. To find out what "such" machinery, plant or furniture means, we have to refer to sub-s. (iv) of S. 10 (2) which authorizes an allowance in respect of insurance of machinery, plant and furniture used for the purposes of the business. The question therefore resolves itself into this—was the machinery of the assessee during the year of assessment used for the purposes of the business from which his profit was derived? I agree with the view expressed by the Commissioner of Income-tax, and in the cases to which he refers that "used" denotes actual user and not merely being capable of being used.

But that does not dispose of the question whether, when machinery is kept ready for use at any moment in a particular factory under an express contract from which taxable profits are earned, the machinery can be said to be used for the purposes of the business which earns the profits, although it is not actually worked. To my mind it is so used. The business from which the profits were derived was that of ginning factories, and the contribution of the assessee to that business was the obligation to keep his machinery ready for actual use at any moment.

It is no doubt true, as the learned Advocate-General says, that it is possible to give to the word "used" a more limited meaning and hold that it includes only the actual working of the machinery, and it is urged that it is that working which occasions depreciation. But I think that the word "used" in this section may be given a wider meaning and embrace passive as well as active user. Machinery which is kept idle may well depreciate, particularly during the monsoon season. It seems to me that the ultimate test is whether without the particular user of the machinery relied upon, the profits sought to be taxed could have been made; and as I read the agreement in this case, the profits of the assessee during the year of assessment could not have been earned except by his maintaining his factory and machinery in good working order and that involves the user of the factory and the machinery. That view is not in any way inconsistent with the views of the Lahore High Court in 5 I T C 257[1] and in 3 I T C 73,[2] where the facts were different. The case in 8 I T C 410[3] is no doubt nearer to this case, but it does not appear from the report of that case that there was any covenant to maintain the machinery in question in reserve ready for actual use during the year of assessment; and I base my decision entirely on the existence of such a covenant in this case. In my opinion, the question raised must be answered in the negative. We allow the assessee, costs on the Original Side scale.

Blackwell, J.—I agree.

A.L./R.K. *Answered in negative.*

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[1] Sri Gopalji Co. v. Commissioner of I. T., Punjab & N. W. F. Provinces, (1931) 5 I T C 257.

[2] Radha Kishen and Sons v. The Commissioner of Income-tax, Punjab, (1928) 3 I T C 73.

[3] Bhikaji Venkatesh v. Commr. of I. T., Central & United Provinces, (1935) 8 I T C 410.

A. I. R. 1937 Bombay 494

BEAUMONT, C. J.

Shamrao Ambaji Nadgouda — Defendant — Appellant.

v.

Holya Subhanna Samagar and *another* — Plaintiffs — Respondents.

Appeal No. 18 of 1936, Decided on 8th April 1937, against decision of Dist. Judge, Belgaum, in Appeal No. 60 of 1935.

Bombay Hereditary Offices Act (3 of 1874), Ss. 11 and 10—Alienation of watan property—Alienation made without sanction comes under S. 11—Claim of person as permanent tenant is not covered by S. 10 or S. 11 — Suit for declaration of permanent tenancy is not barred by S. 4 of Bombay Revenue Jurisdiction Act.

Alienation referred to in S. 11 read with S. 10 of Bombay Hereditary Offices Act, covers any case where a watan or any part thereof has passed without the sanction of the Government into the ownership or beneficial possession of any person other than the officiator, or, if the property has not been assigned, into the ownership or beneficial possession of any person not a watandar of the same watan. But it is to be noticed that under S. 10 the alienation must be without the sanction of Government, and indeed the only alienation of a watan which is forbidden by S. 5 is an alienation without the sanction of Government. It is plain that where one is dealing with a claim to a permanent tenancy founded on S. 83 of the Bombay Land Revenue Code by possession from time immemorial, and where from the nature of the case the origin of the alienation is lost in obscurity, it cannot possibly be proved that that alienation was made without the sanction of the Government. Hence the alienation referred to in S. 11 of the Watan Act does not cover a title sought to be made under S. 83, Bombay Land Revenue Code, by possession from time immemorial. Therefore a suit by a person claiming himself to be a permanent tenant is not barred by S. 4, Bombay Revenue Jurisdiction Act: *A I R 1937 Bom 121, Rel. on.* [P 495 C 2 ; P 496 C 1]

R. A. Jahagirdar — for Appellant.

P. V. Kane — for Respondents.

Judgment. — This is an appeal from an order of remand made by the District Judge of Belgaum. The facts are that in 1923 one Ambaji was the owner of the property in suit, which is watan property, and in that year he mortgaged it for ten years to the plaintiffs or their predecessors. Ambaji died in 1930, and in 1931 his widow adopted the defendant. After his adoption, the defendant claimed from the revenue authorities restoration of the watan property, and the Assistant Collector made an order for such restoration. Before the Assistant Collector, the plaintiffs relied on their mortgage of 1923, but they also claimed that they were permanent tenants under S. 83 of the Bombay Land Revenue

Code as having been in possession from time immemorial. The actual order that the Assistant Collector made was this. He said :

> I find that the lands were alienated in 1922 by applicant's father to the father of opponent No. 1. Applicant's father is dead and the land being watan land and alienated after the passing of the Watan Act, I declare the alienation null and void under S. 11, Watan Act, and order that the property shall henceforth revert to the watan.

In the reasons for this order, the Assistant Collector expressed the view that the plaintiffs did not establish their claim of ancient possession, but the only alienation which he declared null and void was the mortgage of 1922. The plaintiffs appealed to the Collector, and subsequently to the Commissioner, but the order of the Assistant Collector was confirmed. The plaintiffs thereupon filed this suit asking for a declaration that they are permanent tenants of the land in suit, and for an injunction to restrain the defendant from interfering with their possession. The trial Judge came to the conclusion that he had no jurisdiction to entertain the suit, having regard to the provisions of S. 4, Bombay Revenue Jurisdiction Act. In appeal, the District Judge held that in so far as the order of the revenue authorities dealt with the plaintiffs' claim to be permanent tenants the order was ultra vires. The question before me is whether that view is right. Under S. 4, Bombay Revenue Jurisdiction Act, no Civil Court shall exercise jurisdiction as to, amongst other matters, suits to set aside or avoid any order under Bombay Act 3 of 1874, that is, the Watan Act, or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf. So that, if the plaintiffs' claim involves the avoidance of the revenue officer's order, and if that order was a valid order, the suit does not lie. As I have said, in terms the order of the revenue authority merely sets aside the alienation of 1923, and it certainly would not be open to the plaintiffs in a civil suit to challenge that order or to seek to rely on that alienation. But it is said that the effect of the order made by the revenue authorities is to hold that the plaintiffs' claim to be permanent tenants is invalid, and to require the watan to revert on that basis. I am not sure that the order purports to go as far as that, but if in fact the order purports to dispose of the plaintiffs' claim to be permanent tenants, in my opinion, the order of the revenue authorities to that extent is ultra vires.

The order purports to be made under S. 11, Watan Act. That section provides that when any alienation of the nature described in S. 10 shall take place otherwise than by virtue of, or in execution of, a decree or order of any British Court, the Collector shall, after recording his reasons in writing, declare such alienation to be null and void. It is curious that the section which deals only with alienations taking place otherwise than under a decree or order is required to be of the nature described in S. 10, which deals only with alienations made under a decree or order. However, one must give some meaning to S. 11, and I think that the section incorporates the features of the alienation described in S. 10 apart from the special feature that that alienation must be made in execution of a decree or order. But, apart from that feature, it is clear that the alienation referred to in S. 11 must be of the nature of that described in S. 10. Now the alienation described in S. 11 has been recently discussed by Broomfield, J. in 38 Bom L R 1308[1] and he comes to the conclusion that the alienation referred to in S. 11, read with S. 10, covers any case where a watan or any part thereof has passed without the sanction of the Government into the ownership or beneficial possession of any person other than the officiator, or, if the property has not been assigned, into the ownership or beneficial possession of any person not a watandar of the same watan. I think that is an accurate general summary of the type of alienation dealt with by S. 11, but the Court was not there dealing with an alienation brought about by adverse possession. It is to be noticed that under S. 10, the alienation must be without the sanction of Government, and indeed the only alienation of a watan which is forbidden by S. 5 is an alienation without the sanction of Government. It is plain that where one is dealing with a claim to a permanent tenancy founded on S. 83 of the Bombay Land Revenue Code by possession from time immemorial, and where from the nature of the case the origin of the alienation is lost in obscurity, it cannot possibly be proved that that alienation was made without the sanction of Government. For that reason alone, I am of opinion that the alienation referred to in S. 11, Watan Act, does not cover a title sought to be made under S. 83 of the Bombay Land Revenue Code by possession from time immemorial. Whether the alienation under S. 11 would cover other cases of a title sought to be established by adverse possession, it is not necessary for me to consider. In my opinion therefore, inasmuch as this suit deals only with the plaintiffs' claim to be permanent tenants, it is not barred by the order made by the revenue authorities. I think the order does not purport to dispose of such claim, but if it does, the order is to that extent ultra vires. In my opinion, the view of the District Judge was right, and this appeal must be dismissed with costs.

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[1] Khangouda v. Secy. of State, A I R 1937 Bom 121=168 I C 73=I L R (1937) Bom 236=38 Bom L R 1308.

B.D./R K. *Appeal dismissed.*

✲ A. I. R. 1937 Bombay 496

KANIA, J.

Janardan Govind Gore — Petitioner.

v.

Narayan Bhaskar Gore — Respondent.

Petition for Probate in Testamentary Suit No. 9 of 1936, Decided on 25-11-1936.

✲ Succession Act (1925), Ss. 80 and 81—Intention of testator expressed in will—Oral evidence is admissible to show name of testator's friend intended by him on principles of justice, equity and good conscience.

Where a case does not fall either under S. 80 or S. 81, Succession Act, it must be decided on the principles of justice, equity and good conscience applicable to Presidency towns which mean the principles of English law apart from English statutes. [P 496 C 2]

Where the intention of the testator can be proved by the terms of the will, oral evidence would be allowed to show circumstances, habits and the state of the testator's family which would also include the names of the testator's friends mentioned by him, on the principle of justice, equity and good conscience, as the case neither comes under S. 80 nor under S. 81, Succession Act: *(1874) 7 H L 364* and *(1879) 3 Eq 21, Rel. on.* [P 496 C 2]

S. R. Tenduldar and *Sir Jamshed Kanga* — for Petitioner.

Mody and *M. V. Desai*—for Respondent.

Order. — This petition gives rise to an interesting question of law which does not seem to be covered by any authority in India. The question is whether evidence is admissible to show that, having regard to the intention of the testator as expressed in the will, the name "K. N. Godbole" applied to "K. G. Godbole." In the affidavit, filed in support of the caveat, it was alleged by the caveators that in the will, the deceased, by his own hand, had altered the letter "N" into "G" and that alteration was made before other alterations were made by him in the will, which were duly initialled. This particular alteration in question has not been initialled by the deceased. On behalf of the plaintiffs, it is contended that oral evidence is permissible only under S. 80, Succession Act, and unless the case came within that section, no oral evidence should be allowed to be led. On the other hand, it is alleged on behalf of the defendants that Ss. 80 and 81 are not exhaustive. In the particular case, the evidence which is proposed to be led would show that the only friend of the deceased who could answer to the name of "K. N. Godbole" was defendant 2, "K. G. Godbole" and the initial "N" was written through mistake in the will for "G." In support of that contention the decision in (1874) 7 H L 364[1] has been relied upon. There are numerous decisions of English Courts following that and in particular 3 L R Ir 21[2] supports the defendants' contention. Both sides have tried to look for an Indian authority but have not been able to find the same. In my opinion the case is not clearly covered by the express terms used in S. 80 and the case does not fall under S. 81. The point, therefore, must be decided on the principles of justice, equity and good conscience which is applicable to the Presidency towns. That expression is held to mean the principle of English law, apart from the English statutes. On that footing, the defendants' contention should prevail and evidence should be allowed to be led. I should say at once that for allowing such evidence the English authorities show that the proof of intention is to be found in the will and the evidence of intention cannot be led from outside. The intention being proved by the terms of the will, oral evidence would be allowed to show circumstances, habits and the state of the testator's family. That would include the names of the testator's friends, as in the present case the appointment of the executors (apart from his brother) is of his friends as mentioned in the will. Under the circumstances of this case, I therefore hold that evidence is admissible to show what friend of the deceased was intended by him by using the name "K. N. Godbole."

S.C./R.K. *Order accordingly.*

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[1] Charter v. Charter, (1874) 7 H L 364=43 L J P 73=20 W R 212.

[2] In re Twohill, 3 L R Ir 21.

END

Acc. No 177207
Dated 10.11.1980